

## **The ICC, the Security Council, and the Crime of Aggression : international law versus *réal politik* ?**

Is the potential jurisdiction of the ICC, with regard to the crime of aggression committed by an individual, in any conflict with the existing jurisdiction of the Security Council with regards to determination of a state act of aggression ? And if so is this conflict a legal problem or political one ?

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I will assume for the purposes of this essay that the reader is already familiar with the following international instruments, bodies and their basic functions, that is to say the 1945 Charter of the United Nations and the functions exercised under it by the following principal organs ; the General Assembly (“the Assembly”), the Security Council (the “Council”) and the International Court of Justice (the “I.C.J.”) on the one part and the 1998 (Rome) Statute for the Establishment of an International Criminal Court (“the ICC” or “the Court”) and the Assembly of States Party (the “A.S.P.”) to the ICC on the other.

I have had the great honour and pleasure in recent years and months to attend the formal sessions of the ASP, as a non-governmental organisation observer, on behalf of certain groups belonging to the Coalition for the I.C.C., a coalition of national & international groups representing civil society whose wish is to witness the activities and promote the functions of the Court. I come from the United Kingdom<sup>1</sup> where I live and work, and with the assistance and support of the *Planethood Foundation*, for which I am most grateful, I have taken a special interest in that aspect of the debate regarding the putative jurisdiction of the Court over the “crime of aggression”, most especially as that concerns its future relationship with the Council. I remain fully engaged with the very interesting and challenging debates regarding the definition of the crime, as it should come to be incorporated into the Rome Statute, by amendment at the forthcoming Review Conference in 2009. However, for the purposes of this present piece, I wish to discuss my thoughts specifically about the jurisdictional as opposed to definitional aspects.

I am no academic or diplomat, but rather a mere municipal lawyer, practicing as a consultant to solicitors in my own domestic criminal justice system, but with a passionate, peculiar and particular interest in the advancement of international criminal law and in promoting its incorporation into domestic legal systems of criminal justice. Accordingly, I apologise if at times the tone of this essay seems to be less than studiously academic or politically diplomatic, but in so far as by definition it touches upon and at times fully crosses over any line of demarcation between international law and politics, I will in doing so openly and candidly demonstrate my own political perspective. However, I trust that there is a place in this debate for the voices of those observers whose perspectives come out of left field, as they say in Chicago baseball circles, or in my political case perhaps the extreme left field.

It is an almost inevitable consequence of whatever formulation is ultimately employed for the definition of the crime of aggression, as that applies to an accused individual, that the tribunal charged with hearing the prosecution of such a charge must investigate and determine the question as to whether the state, through which that individual, acting in a political, military or other leadership role<sup>2</sup> at the time, was itself (or possibly in the case of an inchoate crime – would have been) responsible for an act of state aggression, in consequence of the carrying out of that individual’s plans and orders etc.. In short, the adjudication upon a charge of aggression by the individual, necessarily involves and implies also a determination of the responsibility of the state, in which he was a leader, for an act of state aggression.

It is in consequence of this feature, that those states who would wish to place a political fetter over the future exercise of the Court’s jurisdiction in relation to any particular allegation of the commission of this crime, see an existing constitutional legal argument as justifying that desire. The argument goes thus.

Art.39 of the UN Charter states :

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<sup>1</sup> In particular as delegate for the Institute for Law, Accountability & Peace (INLAP) of which I am a founder member.

<sup>2</sup> It is now an accepted position that the crime can only be attributed to those persons who exercised “a leadership role” in the state machine apparatus at the time.

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

Ergo, since the Court cannot try a case of aggression committed by an individual without, of necessity, its also having to either make or apply a determination as to the responsibility of the state concerned for a corresponding act of state aggression; and only the Council has the power to determine an act of state aggression, it follows therefore that a prior determination by the Council as to such an effect, is an essential legal pre-condition, to the lawful exercise by the Court of its jurisdiction in respect of this crime. In particular, any amendment to the Rome Statute, incorporating such a future jurisdiction in the Court, must reflect that pre-condition by virtue of the existing terms of Art.5(2) of the Statute, which states that :

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations (emphasis added)

So the terms of the debate have been set. Now it is important to point out that there are already a further two considerations, whereby the prospective jurisdiction of the Court is already going to be subordinate to the political will of the Council. Firstly, under the provisions of Art 16 of the Rome Statute the Council already has the power, by resolution, to order the suspension of any investigation or prosecution before the Court for any reasons, for a renewable period of 12 months. Including, therefore, also any future such investigation or prosecution for aggression. This is already a very significant and arguably unique concession to the exercise of a political power of interference in a judicial jurisdiction.

Secondly, however, it is almost universally conceded by all parties that if the Council were to resolve that, in respect of any particular international situation, the circumstances giving rise to it, were not such as, in its view, to amount to or involve a state act of aggression, such a finding by the supreme political international body with primary responsibility for the restoration and maintenance of international peace and security<sup>3</sup>, as respects such a factual matter, would have to be regarded as subsequently binding on the Court, so that it would in effect amount to a procedural bar on any subsequent investigation or prosecution for aggression, by an individual, in relation to and arising out of the same factual situation.

Consequently, the current debate, as reflected in the options for amending the Rome statute and as have in turn been set out in the so-called "Co-ordinator's Discussion Paper" for consideration by the Special Working Group on the Crime of Aggression ("the SWGCA")<sup>4</sup> considers only the situation, which however is alas all too predictable, where the Council is unable to reach a resolution in respect of such a matter, but remains politically dead-locked, even six months after its having been informed by the Court of an allegation of aggression brought before it.<sup>5</sup>

Accordingly the question then becomes what should happen, and in particular what is legally permissible, in the face of such silence by the Council as a political body ? Should the Court be able to proceed in the interest of international justice and the peaceful resolution of disputed matters, in the absence of a negative determination by the Council ; or, equally is it instead barred from proceeding further in the absence of an affirmative determination by it ? In this distinction, of course, lies all the political difference in the world, quite literally. In the former case of negatory Council powers, political agreement amongst a qualified majority of Council members, including at least acquiescence among all the *veto* wielding P5 is required, in order to justify interference with the administration of justice by the Court. Whereas, in the latter case, of an affirmatory Council role, a single *veto* wielding P5 state can hold up the exercise of the jurisdiction by the Court, as respects any allegation of aggression, for as long as it wants.

<sup>3</sup> See in particular Art 24(1) of the UN Charter. Also Art 2 of Annx to GA Res 3314 (XXIX) 1974 "definition of aggression"

<sup>4</sup> This is the particular international committee of States Party to the ICC, which had been established under the auspices of the ASP and including all ASP members, charged with thrashing-out agreement on these matters.

<sup>5</sup> as to which see in particular Para 5. options in the current Paper. In my view, however, the Discussion Paper should also contain an expressed option as to what the Court is, or is not, able to do in the face of a negatory determination by the Council.

## The case-law of the I.C.J.

It strikes me that a logical starting point for the analysis of the merit to the legal case of those who insist upon a procedural or jurisdictional *fiat* power already existing in the Council, regarding any future jurisdiction in the Court over the crime of aggression, is the existing case-law of the ICJ, the principal judicial organ of the United Nations, with respect to its own view as to its own existing constitutional relationship with the Council under the Charter. Such that we may then ask whether the rationale for that established relationship is peculiar to the ICJ, or whether instead by logical extension we are able to apply it also to the Council's potential future relationship with another judicial tribunal namely the ICC instead?

The extracts offered below from the following five cases are by no means suggested as an exhaustive review of that case-law, however, they do represent in my view an accurate representation of the surprisingly limited expressions of judicial view relevant to this topic area which in the event both the judges of the Court individually and the Court itself have made in the course of the past 50 years or so.

[1.0] *Certain Expenses of the United Nations Case (Art.17 Para.2 of the Charter)*  
**(An Advisory Opinion)** 1962

This Opinion of the Court was generated in response to a refusal by some Member States to pay their contributions to certain expenses incurred by so-called "peace-keeping" operations in Africa, undertaken by the UN under the authority of resolutions passed in the General Assembly, rather than in the Security Council. In short these Member States contended that under the Charter while the General Assembly was entitled to consider, discuss, initiate studies and make recommendations with respect to the restoration and maintenance of international peace and security, it did not have the authority to institute peace-keeping operations, even though those were done with the consent and co-operation of the states where they took place and were therefore short of peace enforcement action. It therefore raised the principal issue of the constitutional relationship between the Security Council and the General Assembly.

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"... This argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.

Article 24 of the Charter provides :

" In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security .... "

The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement action by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. ... Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations ; they are not merely hortatory. ..."<sup>6</sup>

Accordingly whilst not going directly to the issue of the claim to Security Council exclusivity under Article 39, *vis-a-vis* a determination of a state act of aggression, this finding nonetheless specifically addresses the ambit of the more general powers granted the Council under Art.24 and I think set much of the subsequent tone for the Court's view on the constitutional ambit of the Council's powers.

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<sup>6</sup> Opinion of the Court on the Merits (20 July 1962) ICJ Rep [1962] 151

[2.0] *Case Concerning United States Consular and Diplomatic Staff in Tehran*  
(United States v Iran) 1980

In this contested case it was the United States which was seeking a ruling of the Court on the appropriate legal measures to be taken in response to the seizure of its consular offices in Tehran and the taking hostage of its diplomatic staff in Iran. The point was taken by Iran in opposition that a resolution of the matter was already the subject of an active investigation by the Secretary-General acting under the authority of a resolution passed by the Security Council, and therefore that the ICJ did not have jurisdiction to entertain the U.S. complaint whilst the Council was also actively seized of the matter. This case therefore directly raised the issue of the constitutional relationship under the Charter between the Security Council and the ICJ itself with respect to a matter currently before the Council.

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40. .... As already mentioned the Council met again on 31 December 1979 and adopted Resolution 461 (1979). In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there any cause for surprise. Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendations with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. ..."<sup>7</sup>

[3.1] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*  
(Nicaragua v the United States) 1984

A mere four years later the boot was on the other foot as it were, an irony not lost on the ICJ, when it was the United States arguing that the ICJ lacked constitutional jurisdiction under the Charter to deal with the complaint made to it by Nicaragua. They complained that the CIA's support for the Contras waging a guerrilla war against the Sandinista regime in Nicaragua, amounted to a breach of the principal UN prohibition against the use of force, by the United States against the political independence of Nicaragua. The US challenged the jurisdiction of the ICJ because it said Nicaragua's case amounted to an allegation that the US was guilty of a threat to, or breach of, international peace, or an act of aggression, which was a matter within the exclusive purview of the Security Council, which had in turn declined to adopt a draft resolution presented to it by Nicaragua making a similar complaint to that it now presented to the ICJ instead. Although once again the case principally concerned the compatibility of the ICJ's jurisdiction with the exercise of the general powers of the Council under Art. 24, for the maintenance of international peace and security, the arguments of the parties specifically raised also the issue of whether the complaint amounted to a conflict with the Security Council's powers to make a determination under Art.39 as well.

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93. The United States is thus arguing the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the *United States Diplomatic and Consular Staff in Tehran* case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*. ...

The ICJ then cites the passage from its own previous judgement in the *Tehran Case*, as quoted above (under [2.0]), as authority, and thereafter continues as follows :

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94. The United States argument is also founded upon a construction, which the Court is unable to share, of Nicaragua's complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4 of the United Nations Charter. The United States argues that Nicaragua

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<sup>7</sup> Judgement of the Court on the Merits [24 May 1980] ICJ Rep [1980] 3

has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with provisions of Chapter VI. .... It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organisation for peaceful settlement.

95. It is necessary to emphasise that Article 24 of the Charter of the United Nations provides that :

“ In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security ... “

The Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendations with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has the functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events. ...<sup>8</sup>

(emphasis by underlining added)

Accordingly, the ICJ in my reading here makes essentially two vitally important points as justifying or explaining the constitutionality of its parallel exercise of jurisdiction in the case. Firstly, it re-iterates the distinction it first drew in the *Tehran Case* (as above) between the exclusively judicial function of itself on the one hand, and the primarily political function of the Council on the other as creating complementary but distinct functions. Secondly, as respects the asserted conflict with the Council's specific powers of determination under Art.39, as opposed to its more general powers under Art.24, it draws a distinction between an “on-going” armed conflict situation demanding a politically authorised and possibly forcible intervention and a stale or exhausted situation that is appropriate for peaceful settlement or resolution by judicial means.

This is a distinction to which several authors have alluded in recent academic works. In particular Prof. Mark Stein devotes a whole segment of his 2005 article<sup>9</sup> to the contention that the powers of the Security Council under Art.39 are specifically exclusive of a determination of what he terms “stale” aggression, meaning thereby a past act of state aggression since fully concluded and which no longer calls for or warrants a peace enforcement intervention by means of the authority of the Council acting under its Chapter VII powers. I would prefer the adjective “exhausted” to “stale” but that is purely semantical.

I can do no better than to say that such a perspective accords entirely with what I construe as being the natural and ordinary effect of the words of Article 39 itself, and in particular the use of the word “*existence*” as in “The Security Council shall determine the *existence* of any threat to the peace,... (etc)” which necessarily in my view limits the scope of the Article to a determination of a present or “ongoing” state of international affairs which continues to exist, and which thereby then justifies the use of the enforcement powers contemplated elsewhere in Chapter VII triggered by such a determination..

Though I am not intellectually convinced that, even this interpretation of the language of Art.39, ought to mean that, in the case of such an “on-going” or continuing state of aggression, the jurisdiction of the ICC should necessarily be excluded in favour of the exclusive political jurisdiction of the Security Council instead ; never the less the likelihood of (a) the use of the Rome Statute Art 16 powers by the Council, in such a case and in any event (b) the improbability of an active state of aggression continuing for long

<sup>8</sup> Judgement on the Jurisdiction of the Court [26 Nov 1984] ICJ Rep [1984] 392.

<sup>9</sup> formerly Adjunct Assistant Professor of University of Missouri - St.Louis Political Sciences Faculty Article entitled “*THE SECURITY COUNCIL, THE INTERNATIONAL CRIMINAL COURT, AND THE CRIME OF AGGRESSION: HOW EXCLUSIVE IS THE SECURITY COUNCIL'S POWER TO DETERMINE AGGRESSION?*” Indiana International & Comparative Law Review (2005) Vol 16 @ p.15 Hdg. (B)

enough that it was still *extant* by the time it came before the Court for investigation, let alone prosecution, means that such a limitation would be only theoretical rather than having any practical effect.

Accordingly, a clause in the Rome Statute amendment requiring that, as a pre-condition to its authorising the Prosecutor to investigate an allegation of aggression brought to him, the Court (meaning there a pre-trial Chamber) must first be satisfied that the situation comprising that alleged state of affairs has become exhausted in this sense would, for that reason, not be objectionable in my view. To avoid any doubt, however, it should also be made clear that, without prejudice to the legality of the situation, a continuing occupation of territory, which has originally occurred as a consequence of an allegedly aggressive act, does not mean that the state of aggression which led to that occupation also continues to exist as long as the *de facto* occupation continues.

Also often cited as of particular note on the other issue, that of the distinct functions of the two bodies, are the following aspects of the Dissenting Opinion of Judge Schwebel, on this point however consistent with the judgement of the Court, but in which he further expands upon these themes.

[3.2] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v the United States)* 1984 Dissenting Opinion of Judge Schwebel <sup>10</sup>

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“ 56. ... I find myself unable to agree that it was the design of the drafters of the Charter and the Statute to exclude the Court from adjudicating disputes falling within the scope of Chapter VII of the United Nations Charter, and unable to agree that the practice of States in interpreting the Charter and the Statute confirms such a design. ....

58. But while that argument is perfectly plausible, it is, in my view, insufficient. It is insufficient because nowhere in the text of the Statute of the Court is there any indication that disputes involving the continuing use of armed force are excluded from its jurisdiction. ...”

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“ 60. Moreover, while the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression – or, as more often is the case, fail to arrive at a determination of aggression – for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them. ... ”

(emphasis by of underlining added)

Essentially Judge Schwebel is here I find merely re-emphasising the point made by the ICJ (as above) when it sought to explain why the differing character of the functions exercised by the two bodies, that is the political functions of the Council and the judicial functions of the ICJ, also then explains in its view why the Charter takes a different approach with respect to its being permissive of the ICJ’s exercise of jurisdiction in a matter (even a Chapter VII matter), simultaneously with that matter being dealt with also by the Council, or at least of its being constitutionally capable of being so dealt with ; but not equally so permissive of a similar situation with respect to its being dealt with by the General Assembly, at least in the absence of the Security Council itself expressly so seeking to refer the matter to the Assembly.<sup>11</sup>

The only instance of a judicial opinion of which I am aware, expressed by a single judge rather than by the Court itself, which could be said to throw some doubt upon that analysis of the decision in the *Paramilitaries Activities Case* (as above), is the following extract from the dissenting opinion of Judge Weeramantry in the *Lockerbie Case*.

[4.0] *Case Concerning Questions of Interpretation and Application of the Montreal Convention : Arising out of the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* 1992

<sup>10</sup> Judgement on Merits : Dissenting Opinion of Judge Schwebel [27 June 1986] ICJ Rep [1986] @259 et seq.

<sup>11</sup> As to which see in particular Art.12(1) of the UN Charter

“However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter. Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal.”<sup>12</sup>

(emphasis added)

However, I would draw the reader’s attention to that part of the short passage which I have emphasised wherein this distinguished judge says “*It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation.*” In so far as it is this essential point which Judge Weeramantry is seeking here to make, and which as I see the facts in the *Lockerbie Case* is entirely consistent with his doing so, then so be it. A determination of a threat to, or breach of, the peace or an act of aggression for the purposes of thus enabling it to exercise its powers under Chapter VII of the Charter, as being something within the exclusive domain of the Council is a finding with which I, or I’d doubt anyone else, has any difficulty whatever.

It merely re-states in a different form what I take to be the natural and ordinary meaning of the language of Art.39 of the Charter. Any attempt to invoke the jurisdiction of the ICJ, or for that matter of any other tribunal, so as to judicially challenge or review such a determination on its merits, and thus any action taken or more likely not taken by the Council under Chapter VII on that basis, would I’m sure be doomed to failure. However, that is something which is naturally entirely distinct and distinguishable from saying that a determination, for whatever purpose, sought by any international body, of a threat to or breach of the peace, or an act of aggression, is also and always exclusive to the Security Council alone.

Finally, there are similarly strident views, expressed very recently by at least two judges of the Court in the *Armed Activities in the Congo Case*, this time in separate but confirmatory opinions, and dealing precisely with the issue of the Court’s jurisdiction to determine the existence of an act of aggression involved in a case before it, absent any prior similar determination by the Council under Art.39.

[5.1] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005

Separate Opinion of Judge Elaraby<sup>13</sup>

“ 9. In view of the submissions of the Applicant, and the gravity of the violations recognized by the Court, I feel it is incumbent upon the Court to respond to the serious allegation put forward by the Democratic Republic of the Congo that the activities of Uganda also constitute aggression as prohibited under international law.

10. Aggression is not a novel concept in international law. In the aftermath of the Second World War, the Nuremberg Tribunal stated that “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” (Judgment of 1 October 1946, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November-1 October 1946, Vol. 1, p. 186). The founding of the United Nations was a landmark and a turning point in the outlawing of the use of force. The Charter of the United Nations lays down, in Article 2, paragraph 4, a general prohibition on “the threat and use of force” in States international relations. Article 39 confers upon the Security Council the authority to make a determination of the “existence of any threat to the peace, breach of the peace, or act of aggression” in order to make recommendations and take action under other provisions of Chapter VII for the maintenance of international peace and security.

<sup>12</sup> Judgement on Provisional Measures : Dissenting Opinion of Judge Weeramantry ICJ Rep [1992] 3, 66.

<sup>13</sup> Judgement on the Merits : Separate Opinion of Judge Elaraby [19 Dec 2005] ICJ Rep (2006)  
<http://www.icj-cij.org/docket/files/116/10465.pdf>

11. It does not follow however that the identification of aggression is solely within the purview of the Security Council. The Court has confirmed the principle that the Security Council's responsibilities relating to the maintenance of international peace and security are "primary' not exclusive" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 163*), it is clear that aggression - as a legal as well as a political concept - can be of equal concern to other competent organs of the United Nations, including the Court as "the principal judicial organ of the United Nations" (Article 92, Charter of the United Nations). Although the term's use in political and popular discourse is often highly charged, it nevertheless remains that aggression is a legal concept with legal connotations and legal consequences, matters which fall clearly within the remit of the Court, particularly when the circumstances of a case coming before the Court call for a decision thereon. There is now general recognition that, as Judge Lachs wrote in the *Lockerbie* case, "the dividing line between political and legal disputes is blurred as law becomes ever more frequently an integral part of international controversies" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992, I.C.J. Reports 1992, p. 139*).

(emphasis added)

Whereafter Judge Elaraby then proceeds to expressly find Uganda responsible for acts of aggression against the D.R.C. basing himself upon the definition of state aggression as set out in the Annex to General Assembly Resolution 3314 [XXIX] of 1974 on the Definition of Aggression. There is then also the separate opinion of Judge Simma which expresses similar views.

[5.2] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*

Separate Opinion of Judge Simma<sup>14</sup>

**"1. The use of force by Uganda as an act of aggression**

2. One deliberate omission characterizing the Judgment will strike any politically alert reader: it is the way in which the Court has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant has committed an act of aggression. In this regard I associate myself with the criticism expressed in the separate opinion of Judge Elaraby. After all, Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under her own control, or that of the various Congolese warlords she befriended, for several years, helping herself to the immense natural riches of these tormented regions. In its Judgment the Court cannot but acknowledge of course that by engaging in these "military activities" Uganda "violated the principle of non-use of force in international relations and the principle of non-intervention" (Judgment, paragraph 345 (1)). The Judgment gets toughest in paragraph 165 of its reasoning where it states that "[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter". So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel*, *Nicaragua*, or *Oil Platforms*, border on the insignificant.

3. It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region (cf. paragraph 150 of the Judgment) has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of "this most serious and dangerous form of the illegal use of force" laid down in General Assembly resolution 3314 (XXIX). The Council will have had its own. political. reasons for refraining from such a determination. But the Court, as the principal judicial organ of the United Nations, does not have to follow that course. Its very raison d'être is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter !"

(emphasis added)

<sup>14</sup> [19 Dec 2005] ICJ Rep (2006)

Accordingly, I feel confident in being able to draw from this review of the history of the case-law of the ICJ to-date, all be it remarkably slim on such an obviously important issue, the following firm conclusions:

- The powers of the Security Council, whether of the general nature under Art.24(1) in respect of the maintenance of international peace and security, or the more specific nature under Art 39 in respect of the determination of a threat to, or breach of, the peace, or an act of aggression, are not so “exclusive” to it under the Charter, so as to thereby deny jurisdiction to the ICJ to examine and judicially determine matters of fact in a case brought before it, when it is appropriate to do so in the interest of justice and the peaceful settlement of disputes.
- This remains so even if the Security Council is actively seized of a matter also the subject of a case under consideration by the ICJ, and this is justified upon the rationale that the two bodies exercise entirely distinct and distinguishable functions (i.e. political and judicial) which create a complementary as opposed to contradictory relationship.
- Furthermore, that whilst the combined effect of Arts. 24 & 39 is to accord to the Council a specific and peculiar responsibility to take prompt action, by enforcement measures if needed, to rectify an international situation comprising in an “on-going” threat to, or breach of international peace and security, or act of aggression ; this is entirely distinguishable from an exhausted or stale such situation which may be entirely and appropriately amenable to peaceful settlement by resort to a judicial forum in stead or as well.
- Finally that there is nothing in the foregoing which denies or places any doubt upon the political reality that, in exercise of the powers granted it by virtue of Art.39 of the Charter, the Security Council alone is the sole and exclusive arbiter of when an international situation has reached the stage that it comprises in a threat to, or breach of, the peace or act of aggression so as to thereby enable it to then take measures permitted by Chapter VII of the Charter (i.e. Art.41 or 42 measures). Accordingly, nothing in the foregoing serves to suggest that such a politically motivated determination, or more likely lack of determination, is thereby open to judicial challenge or review by the ICJ or any other international judicial forum.

The question now becomes to what extent can the principles underlying this established relationship between the Security Council and the ICJ, under the constitutional governance of the Charter of the United Nations, be applied by rational extension to consideration of the present topic of debate, namely what existing legal limitations (if any) are imposed upon any future relationship between the Security Council and the ICC instead, with respect to the determination of a state act of aggression ?

Once again the first point of consideration as it seems to me is to ask whether there is anything in the Charter of the United Nations which assist with that consideration .

### **The significance of Article 95 of the Charter**

In the course of the many and several learned articles by international law academics which I have read on this rather narrow but immensely significant topic I am yet to read one which more than barely touches upon, yet alone suggests any great significance in, the application of the provisions of Art.95 of the Charter of the United Nations in this regard. This provision is commendably short and to the point :

“ Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals ..[other than the ICJ].. by virtue of agreements already in existence or which may be concluded in the future.”

In so far as I have been able to establish why it is generally thought by these academics that this provision does not have the significance to the present topic, which at first blush it yells out to me, is essentially two-fold.

Firstly, it is said that the reference to “*entrusting the solution of their differences to other tribunals*” is not apt to include the processes of entrusting an allegation of international criminal law breaches, when committed by individuals, to the adjudication of a permanent international criminal court. Rather it contemplates references only of the nature of inter-state disputes, to a tribunal with jurisdiction over states

party and with respect to a dispute as between the said states, i.e. fully complementary to the jurisdiction of the I.C.J. itself. Yet neither is that what the provision actually says, nor does it seem to me, even if so narrowly construed, that such would inevitably exclude complementarity with the jurisdiction of the ICC either. Most particularly when it comes to the crime of aggression which, unavoidably by its very nature, must contemplate or imply a forcible indeed violent “difference” as between two or more states being involved in the situation, in addition to the criminal conduct in the individuals accused of being personally responsible.

It is entirely possible, indeed as it seems to me in the fullness of time even hopefully probable, that the terms of some future peace-treaty settlement, as negotiated between two or more states who have been recently involved in the unbridled use of international armed force against one another (i.e. at war with each other -as ordinary people would still term it ), may well require, as a condition for such permanent peace terms, that the former head of government or similar leaders of the state, which is alleged to have been the aggressor in the initiation of that armed conflict, is surrendered by his host nation to stand trial before the ICC on that allegation. Naturally only if the Court is willing to so investigate and prosecute that allegation.

In such a case, would such a condition of a peace treaty, then not fully comply with the language as expressed by Art.95 ? Could not the determination of an allegation by one state party, submitted under Art 14 of the Rome Statute that the head or other leader of another state party at the time, was personally and individually responsible for initiating an act of aggression against it, comprise in the very essence of a pacific solution to a differences between those states ? I submit that of course it could, and that such a process represents the very function, by means of subjecting their differences to the rule of law, rather than the fortunes of war, which the Rome Statute process embodies and which we must hope it lives to promote.

Should the ICC then be denied the fulfilment of this its paradigm role, as an impartial and trusted independent instrument for the judicial determination of the truth, by the third party political motives and *real politik* machinations of Security Council members, even when the states most directly concerned have themselves both resolved by diplomatic means to resort to the jurisdiction of the Court, expressly in order to assist as part and parcel in the pacific settlement and solution of their differences ? I would respectfully submit that such an interpretation would not merely defy the clear terms of Art 95 of the Charter, but moreover would be in obvious clear and contumacious breach of the very declared purposes of the United Nations itself, as set out in the preamble and Articles 1 & 2 of the Charter, to promote the pacific settlement of international disputes, and which as we have seen in the case-law history of the ICJ itself, explains and justifies its own view as to its complementarity with the Security Council.

If then it be conceded that two (or more) individual states could, in the express terms and in the interests of solving their specific differences, so voluntarily submit their leaders (or more likely former leaders) to the jurisdiction of the Court in the interest of the pacific settlement of a particular dispute ; then logically why cannot the Rome Statute itself be properly seen and viewed as, at least in part, a multi-lateral treaty instrument to permanently achieve and embody the same effect. To remind the reader the preamble to the Statute states that the Parties to it have so entreated :-

Recognizing that such grave crimes threaten the peace, security and well-being of the world,  
Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,  
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. ...  
Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, ....

It strikes this author at least that these declared purposes, as preamble to the creation of a permanent institution, aptly reflect a multi-lateral treaty instrument whose very core design is, amongst other things, to assist those states party to it to entrust the solution of their differences to a judicial, and thus pacific mechanism, and thus falls fully within both the language and intent of Art.95.

Secondly, it is said that the purpose of Art 95 is understood as being limited to permitting complementarity or “non-exclusivity” only as respects the functions of the I.C.J. itself, and not as regards other principle organs of the UN Organisation, such as the Security Council. However, the sole justification for this limitation, as it has been explained to this author, comes down to nothing more than that the Article in question appears in the context of Chapter XIV of the Charter dealing with the establishment and purposes of the ICJ.

As a lawyer whose experience is principally as a municipal litigator, this construction in my view falls at the first hurdle. Under the principle of statutory construction as expressed in my municipal common law, as I suspect in many others, certainly in all English common law jurisdictions, resort to construction by reference to surrounding context from the chapter or clause in which the text is written, is only permissible where a clear and unambiguous meaning is not first discernable from the natural and ordinary meaning of the words used in the text. (the literal or so-called “golden” rule of construction). I am content to think that such a rule is fully compatible on the international plane with the thrust of the provisions of Art. 31 of the Vienna Convention. which holds that:

- “ 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. “

Hence “context” for this purpose clearly contemplates the context of the entire text of the treaty rather than merely the text surrounding a particular clause thereof . I appreciate that there is only a difference of a single letter between the word “Charter” as in the words of Art.95 “Nothing in the present Charter shall prevent...(etc)” and the word “Chapter”, but naturally there is nothing in that which would permit the Article in question to be read as if it said the latter rather than the former. The natural and ordinary meaning of the word “Charter” as used in Art.95 means to this author, beyond any possible ambiguity, that it can be permissibly read in short, for present purposes, as if it said “*Nothing in Article 39 shall prevent ...*” ; and so read its relevance to this issue is as self-evident as it is unambiguous. Accordingly, I find both of these rationales, for ignoring the self-evident significance of the effect of the provisions of Art.95 on the present topic of debate, namely the effect of Art39 of the Charter on the potential jurisdiction of the ICC over the crime of aggression, as being thoroughly unconvincing and unsatisfactory.

On the contrary, applying the natural and ordinary meaning of the words of the Article, particularly as read in short as suggested, I find it to be utterly destructive, by itself alone, of the contention that the ICC could not in future lawfully exercise a jurisdiction which involved its being able to determine the past existence of an act of state aggression, committed by a state party, as a part a parcel of its trying a case of individual aggression, simply because such a determination is “exclusive” to the Security Council under Art.39 of the Charter instead. The contention speaks rather in my mind to the visual impediment of those whose politico-diplomatic spectacles permit them only to read such parts of Chapter VII of the Charter of the United Nations as they find conducive to their perceived geo-political status and ambitions, and who once again fail to place the provisions of Chapter VII within the wider context of a Charter intend by its drafters at the time to unite the world in peace and justice rather than in fear and favour.

### **Existing precedents.**

Indeed it is my position that not only does there exist the requisite permissive constitutional framework, at least as indicated by the terms of Art.95 of the Charter of the United Nations, to permit such a complementary future relationship between the jurisdiction of the ICC, with respect to the crime of aggression, and the powers of the Security Council under Art 39 ; but, moreover, that there already exists a situation of complementarity between the two bodies, with respect to certain of the international law crimes already within the jurisdiction of the ICC, and therefore which establishes a working precedent for such a relationship.

Under Art. 8(2) of the Rome Statute the term "war crime" is defined as meaning :-

" For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely ... b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely...."

(emphasis added)

Furthermore, with specific reference to the crime of a grave breach of a Geneva Convention, common Art.2 of the four Geneva Conventions of 1949 provides that :

" In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. ..."

Now it must of course also be acknowledged that many (but by no means all) of the provisions both of the Rome Statute and the Geneva Conventions also apply in the case of an armed conflict not of an international character (see naturally Common Art.3, the 2<sup>nd</sup>. Additional Protocol of 1977 & Art.8 (2)(c)(d)&(e) of the Rome Statute). However, this leaves many instances where, in the exercise of its present jurisdiction, the ICC could be called upon to determine, and has the power to so determine, that a state of "*international armed conflict*" existed at the relevant time, as part and parcel of the definitional element of a crime within its existing jurisdiction.

Hence, even though it may be entirely possible to conceive of a theoretical instance where a state of international armed conflict does not also necessarily comprise in, or constitute, at least the basis for a breach of international peace ; it must equally be rational and logical to say that, in many instances if indeed not most, such a state will of necessity also legally constitute a breach of international peace. After all although the term "a breach of the peace" is not defined or further interpreted with the Charter itself , what else does it contemplate, if not at the very least a state of international armed conflict amounting to or involving the commission of international law crimes ?

Given that that is so then it follows that, the existing jurisdiction of the ICC (under Art 8), already gives it a power to determine, for its own judicial purposes as a part and parcel of the investigation and prosecution of a war crime, a state of international affairs, namely a state of international armed conflict, which power in many instances it will share in parallel with the UN Security Council, acting under Art 39 of the UN Charter, namely the power to determine, in turn for its own political purposes, a breach of international peace. It therefore follows that as a matter of *lex lata* the determinative powers of the UN Security Council under Art.39 of the Charter are not exclusive, but rather complementary, in particular with respects even to some of the existing powers of the ICC.

More over as we have now moved onto the subject of precedents for the existing state of the law (*lex lata*), one further matter which has always struck me about the way in which international lawyers and academics have dealt with this topic is the tendency to treat the authority of the Nuremburg Tribunal precedent as if it pre-dated the establishment and operation of the UN Security Council and was entirely distinct from it. This possibly also explains why many appear also to ignore the fact that whilst the UN Charter was in fact signed at San Francisco on 26th June 1945, the Charter of what became the Nuremburg Tribunal, was signed only seven weeks later in Limehouse in London, on 8th August that same year. Hence the establishment of the UN Charter actually preceded the establishment of the Nuremburg Charter, as in fact did the UN Charter come into force (as per Art 110(3) thereof - incld Art 103 thereof) some 2 months before the IMWC Tribunal later opened its proceedings in Nuremberg on Nov 20 1945.

There can be no doubt but that the Nuremburg Tribunal tried the former defendant former leaders of the Nazi German State appearing before it on a charge or charges (crimes against peace and conspiracy to commit the same) which amounted to, and necessarily involved, its having to establish and determine that the German state, then under their control, had been guilty of various acts of state aggression against others states e.g. Poland, France, Norway etc. etc. According then to those who now favour the exclusive jurisdiction in this matter of the Security Council under the UN Charter, therefore, the Nuremburg tribunal could only have legally done that following a prior determination, of the commission of such state

aggression by Germany, by means of an affirmative resolution of the Council under Art. 39, albeit as respects such acts of state aggression committed before the UN itself came into being.

However, of course, no such Council resolution was ever proposed let alone drafted and made. Ergo the only historical precedent that exists, for a judicial tribunal to both investigate and prosecute individuals for the commission of what amounts to an act or acts of international aggression by individuals, former leaders of a state machine, establishes that such a tribunal was lawfully able to determine the corresponding commission of an act of state aggression, by the state of which those individuals were the then leaders, in the absence of a prior determination as to that fact, by the then extant Security Council of the United Nations. This is a precedent of such great significance at the time and which I submit we cannot now lawfully ignore.

### **Options for compromise**

#### **(a) Difficulties with current proposals**

Much of the time of the SWGCA in its recent meetings has been taken up, quite understandably, with consideration of a veritable plethora of compromise positions, attempting to find an elusive half-way house, acceptable to most if not all of the P5, with the ostensibly benign purpose of both respecting the judicial independence of the Court on the one hand, whilst at the same time assuaging their concerns over the international political aspects and consequences of prosecutions for the crime of “aggression”.

Much of this territory has been more than adequately covered in the existing academic articles I have read, and since I largely concur with the consensus of views arrived at in those articles, I do not here propose to cover this aspect in any detail. Suffice to say that in the final analysis I find that all these compromise proposals really achieve is an unhelpful complication and impractical impediment to the independent, fair, free and judicial exercise of jurisdiction by the Court instead.

Proposals which rely at their heart upon locating the exercise of the pre-determination function in the General Assembly, rather than the Security Council, do not get around the fact that the Assembly is every bit as much a political forum as the Council, merely one over which the P5 states do not exercise so much exclusive political control. Proposals which rely on referring the matter of the pre-determination of a state act of aggression to the judicial forum of the ICJ instead, cannot get around the fact that the Security Council or the General Assembly are the political gate-keepers to that judicial forum, so that in truth this suggestion becomes only a further political impediment, and a very long time consuming impediment at that, to the independent exercise of jurisdiction by the ICC instead.

Indeed, it seems to me very likely that, even were a sufficient political consensus to somehow be created, in either the Assembly or the Council, in order to refer to the ICJ the matter of such a determination as to an act of state aggression in a specific case, presumably by way of a reference under Art.96 of the Charter for an Advisory Opinion, the ICJ may well consider, having regard to its existing case-law jurisprudence, that such an overtly contentious and specific matter as that, touching directly upon the specific rights of two or more particular member states not themselves resorting to the Court under its Chapter II contentious jurisdiction instead, would so prejudice the rights of those states and their potential future exercise, as to render the reference for such an advisory opinion an inappropriate procedure in any event.

In the final analysis, the issue is one of fundamental principle, namely the separation of political and judicial powers or functions, a principle which states, who willingly boast of such separation of powers within their own domestic government administrations, are nonetheless unwilling to see applied equally to the administration of justice on the international plane as well, and all the compromises in the world may fudge but cannot ultimately eradicate that issue of fundamental principle.

#### **(b) The Language Issue**

It has occurred to me that one means whereby the distinction could be, and perhaps should be, made between the political jurisdiction of the Council, with respect to state conduct, in the one instance, and the putative judicial jurisdiction of the ICC, with respect to individual criminal liability in the other, would be by means of the expedient of applying a different terminology for each purpose. This is so say reserve the term “aggression” with all of its historical political overtones for the political situation alone, relevant only

to the political determination of, and enforcement action to reverse, such an act when committed by a state or states against one another. Distinct from the established term “crime against peace”, as coined by the Nuremburg Charter, reserved for the criminal conduct by an individual leader of the state concerned instead. It should, of course, be noted that the similarly constructed name “crime against humanity”, also deriving from the Nuremburg Charter, is already one of crimes under the jurisdiction of the ICC under Art 7 of the Rome Statute.

Of course, this doesn't by itself address the essential issue as to the relevant definitional elements of the crime in the individual, whether overall termed a “crime of aggression” or a “crime against peace”, which under the Nuremburg Charter, involved the use of the expression “war of aggression”. However, at present it should also be noted that at least one of the options open for negotiation within the SWGCA Co-ordinator's Paper<sup>15</sup> refers to a definitional element in the crime of no more than reference to an “armed attack” or “use of force”, in place of “act of aggression”, which language option would, if adopted, then provide the further element of necessary linguistic distinction as respects this definitional aspect also. It would then follow, to carry the point to its conclusion, that no aspect of the exercise of the putative jurisdiction of the ICC would involve, linguistically at least, any conflict with the powers of the Council under Art.39 to determine a state act of “aggression”.

In the end I take the view that this device amounts to little more than philological sophistry, and that honestly approached instead there should be no difficulty in recognising that the term “aggression” has both a political and a judicial dimension, and that the two bodies, the Council and the ICC, as is the case between the Council and the ICJ, would serve different but complementary functions not therefore suggesting the need or requirement for one to be made subordinate to the other.

However, to lend from the Stratford Bard for a moment when Juliet muses “*wouldst not a rose by any other name smell as sweet ?*” then - had it been sufficient for Lord Capulet and his family to embrace Romeo as son-in-law - but for his merely to be re-named from a Montague, then who would stand in the path of such a solution ? However, the point of the expression is surely that the name is but the surface label and we should be looking for a deeper and more meaningful solution than this linguistic device, if it is ever to enjoy a lasting respect and support of the wider international multi-lingual community ?

#### (c) A political “filter” demands reciprocity

It is said that the principal driving incentive for the need to assuage the P5, is their concern regarding their perceived peculiar vulnerability to “politically motivated” prosecutions citing them, being brought before the Court, unless they are able to exercise their Security Council *veto* powers to prevent it. This issue of so-called “politically motivated” prosecutions was indeed expressly referred to by the Belgian delegation, as being addressed by its proposal, first advanced at the opening session of the Fifth Assembly in the Hague in Nov 2006 and further refined at the second session at the UN in New York in Jan 2007.

This proposal calls for a specially “expanded” Pre-Trial Chamber to deal with the authorisation of investigations into allegations of aggression, increasing the usual number of judges involved from 3 to the entire pre-trial division instead. However, I ask myself what is the legal definition of a “politically motivated” prosecution and how is this distinguished in the case of an allegation of aggression from similar motivations applying in the case of any of the other crimes currently within the jurisdiction of the Court ? More particularly how is a larger pre-trial chamber better equipped to *judicially* deal with such a matter than an ordinarily constituted chamber?

It is the function of an ordinary existing pre-trial chamber of the Court, under Art 15(4) of the Statute, to authorise the Prosecutor to commence an investigation of an allegation only if it considers “... *that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court ...*”. Inevitably this is a determination which the Court may only reach in a judicial manner, having regard only to those juridical sources and applicable law (under Art 21) which it is permitted to employ. Accordingly, the merits in an allegation, such as then warrants the authorisation of its investigation by the Prosecutor, are quite obvious currently tested strictly according to established

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<sup>15</sup> within the so-called “Co-ordinator's Paper” before the Special Working Group on the Crime of Aggression (SWGCA) of the Assembly of States Party to the Rome Statute see the end of para. 1 and foot note.3.

judicial standards and obviously not political considerations. Essentially the central issue at the Art 15(4) stage determination is would the alleged facts, if established to be true by the investigation sought, amount to the definition of a crime, admissible for prosecution before the court under Arts. 17,18 & 19 ?

If this is the test to be applied, as I am quite sure it is, then the issue as to whether or not those, who initially brought the matter of that allegation before the Office of the Prosecutor, were motivated to do so, in whole or in part, by political considerations is wholly irrelevant. Indeed, it would be equally wholly improper and injudicious I would contend for the Court (that is a pre-trial chamber) to take such a matter as that into consideration when making its determination under Art.15(4) of the Statute. Doubtless many (if not all) such references of matters to the Office of the Prosecutor may be motivated, at least in part, by the political considerations of those making them ; but whether or not that is so, and to what extent it may be so in any particular case, is obviously completely irrelevant as to the Court's duty to determine whether they are worthy of investigation. It is that distinction, and in that alone, where we place our trust when we resort to the impartiality and fairness of the judicial process.

Whether or not the victims of a war conducted in or by State A, are politically motivated in part to bring to the attention of the Office of the Prosecutor an allegation of the commission, in the course of that war, of crimes within the jurisdiction of the Court, allegedly committed by the political leaders of that State, is obviously utterly irrelevant as to whether or not the Court should authorise the investigation of those allegations. Accordingly, I remain entirely unclear how the simple expedient of expanding the number of members of a pre-trial chamber, who are expected and duty bound to conduct themselves wholly judicially, is helpful in the particular case of an allegation of aggression, merely because it is asserted that such allegations are more likely to be more political motivated than in other cases, when the question as to the "political motives" of those bringing such allegations is, or at least most assuredly ought to be, wholly irrelevant to that judicial function in the first place.

In truth the only institution appropriately equipped to "filter-out" allegations from consideration by the Court, on the extra-judicial basis, that such allegations are, or are considered to be too, "politically motivated" - whatever that means -must by definition be an appropriately constituted political body, equipped to make such overtly political determinations. However, even were I to be persuaded that there was some greater good to be fulfilled by such a "political filter" on the exercise of the jurisdiction of the Court, which most assuredly I am not, I would not in any event see the Security Council of the United Nations as qualifying as an appropriate political forum for that purpose either.

The principal, though by no means only, reason being that I would regard it as an irreducible minimum political requirement that states, voluntarily subjecting their sovereign rights over their own criminal prosecutorial jurisdiction with respect to not merely their own nationals, but moreover their own former or even potentially current political and military leaders, to the political pre-determination of an international body as to the subsequent exercise of such a jurisdiction by an International Court instead, could only be achieved subject to the principle of full reciprocity. The obvious example of an established such reciprocity, as to the exercise of jurisdiction by an international judicial tribunal, being Art 36(2) of the Statute of the ICJ, whereby states declare themselves subject to the compulsory permanent jurisdiction of that Court, but obviously only on a reciprocal basis with respect to those states who would be their accusers.

Why on earth should anyone expect that a sovereign nation state would subject its own political or military leaders to a political determination, as to the exercise of jurisdiction by a court over them, which would include votes being cast by states, who have not themselves similarly and reciprocally subjected their own nationals and leaders to the same possibility of a political determination? The suggestion appears to me to be so manifestly one-side and bias in favour of those Security Council members who would then have a political role, and in the case of certain of the P5 *veto* power states, a political control, over a process of manifest political determination as to which allegations should be investigated by the Court, and which not, as to be unimaginably unacceptable. Only aggravated further by the knowledge that this is a process which most of those most powerful states are not themselves presently prepared to subject their own nationals and indeed political and military leaders to. How could anyone ever regard such an arrangement as politically acceptable to the those many states fully willing to sign up and surrender their sovereignty to the independent jurisdiction the Court, but having no political influence in the Council which then determines the exercise of that jurisdiction ?

It is all very well academics and others saying that this is simply a matter of *réal politik*, but with respect it is they I think who need to get *réal*. The regard with which the global community of civilised nation states may once have held the political integrity of the Security Council, in the immediate aftermath of the Second World War, has long since faded to ashes. If an alien visiting this planet were ill-advised enough to judge the post war success of the Security Council, as an institution in fulfilling its duty to the maintenance of international peace and security, on the record of the number of determinations it has made in its life to-date of instances of state acts of aggression, one would be forgiven for thinking that we live today in a pacific paradise, a veritable second Garden of Eden. Obviously we do not, and equally obviously it is unreal to suggest that states can now continue to rely on the political integrity of the Security Council to do its duty impartially, that is *réal politik*.

If it were to be regarded, which as I have stated I do not accept, that an overtly “political filter” on the exercise of jurisdiction by the Court is thought necessary and appropriate, then in keeping with the principle of reciprocity I should have thought that the only political forum, with the necessary qualification to perform that function, in keeping with that principle, would be the membership of the ASP, as the political parliament of the Court itself. Furthermore indeed only those states party, members of that Assembly, as had already declared themselves at the time fully subject to the jurisdiction of the Court with respect to the crime of aggression. Only in such a way would fundamental demands of fairness and reciprocity seem to me to be achievable.

## Conclusions

Having been quite so negative and dismissive about the proposals for advancement of the process as suggested by others, I should now at least say what I would see as the practical prospects for progress. The starting point from my perspective must be to say that settlement of an agreed definition of the crime, leading to a corresponding amendment of the Rome Statute, is entirely separate, distinct and severable issue from the question of an agreed basis for the exercise of the Court’s jurisdiction in relation to that crime. From what I have witnessed myself to-date I would assess the prospects for an agreed definition of the crime as reasonably fair, there being no fundamental issues of principle, as I see it, dividing significant parts of the global community as represented in the ASP, and naturally I find this an enormously encouraging state of affairs.

I have no hesitation in saying, however, that any suggestion by parties that agreement regarding the two matters, namely definition of the crime on the one hand and the conditions for the exercise of jurisdiction by the Court on the other, must be linked, such that they will only agree to the two matters jointly as an all or nothing package, would in my view comprise nothing short of political black-mail and should be dealt with accordingly. The two issues are intellectually, logically and jurisprudentially entirely distinct and severable. Naturally, if you as a party are so unsatisfied with the terms of an agreed definition, that you would not contemplate subjecting your nationals, let alone political leaders, to the possibility of investigation and prosecution for such a crime, then it would not matter to you what the terms for the exercise of jurisdiction by the Court might be - you would obviously not sign up to such a process in any event. Equally, if you are politically unsatisfied with the agreed terms for the exercise of jurisdiction by the Court, then no matter how reasonable and fair you might consider the agreed definition of the crime to be - you equally would not sign up to such a process either. The two matters should be dealt with, when it comes to the amendment of the Statute, as separate and severable issues.

Furthermore, agreement over the definition of the crime alone, would in no manner be entirely undermined or rendered a useless exercise due to a lack of agreement over the conditions for the exercise of jurisdiction. Such an agreement would then permit states belonging to the coalition of the willing, willing that is to seek peace rather than wage war, to use such an agreed definition as the requisite international template for a consistent and uniform regime of national incorporating legislation, thereby carrying the consensus politics of an anti-aggression coalition forward on a multi-national, if not yet international level, towards a second review conference, whenever a majority of states party deem the time propitious to seek a sufficient majority in favour of an agreement over jurisdiction as well <sup>16</sup>.

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<sup>16</sup> per terms of Art 123(2) of the Rome Statute

However, if in the event, a sufficient consensus of view over the terms and conditions for the exercise of jurisdiction, cannot be achieved in the ASP by the time of the 2009 Review Conference ; then, I would submit that if (by that time) the P5 states, and their political acolytes, are still maintaining the standpoint that affirmative pre-determination of a state act of aggression by the Security Council is a legal necessity, pursuant to the provisions of Art 39 of the Charter, then the General Assembly and/or the Security Council, should both be required to submit that matter to the ICJ, under Art 96, for an advisory opinion. In light of the review of its admittedly slim case-law history as set out above I nonetheless firmly take the view that such an Advisory Opinion by the ICJ would in the end come down in favour of the potential for independent jurisdiction in the ICC, even absent a Council pre-determination under Art 39, most particularly with respect to the case of an “exhausted” or “stale” act of aggression.. I set out below a helpful draft suggestion as to the kind of question which could be submitted to the ICJ under such a reference, obviously there are a number of refinements and nuances which others would say it fails to address, but I continue to consider the framing of such a suitable question as entirely possible :

Were the 1998 Rome Statute to be amended, so as to confer a jurisdiction on the ICC to determine the existence of a state act of aggression, for the purpose of then enabling that Court to investigate and where appropriate prosecute an individual accused of a crime of aggression – would such an amendment be consistent with the Charter of the United Nations (as per Art.5(2) of the existing Rome Statute) ?

At that point in time, however, the cynic in me says I would not have to listen too hard to hear the very same voices, as now claim the necessity for a Security Council pre-determination as being a legal requirement rather than a political demand, then start to assert instead that the matter is a “political issue”, not amenable for reference to the ICJ under the advisory opinion procedure. However, I submit that rationally they cannot have it both ways. Either the question is principally legal in character, in which event the advisory opinion reference is entirely appropriate ; or it is principally political in nature, in which event present references to the provisions of Art.39 of the UN Charter are in truth merely a smoke-screen for power politics and political greed pure and simple.

In conclusion, I regard the concessions to the superiority of the political will of the Council already made by way of Art.16 of the Rome Statute, and also by reference to an acceptance of the binding nature of any negatory Art 39 Council determination, as respecting there being **no** act of state aggression in a given international situation, to comprise more than enough to satisfy and assuage the asserted demands of *réal politik*. Any further concessions would, in my respectful view, turn the exercise of the jurisdiction of the Court, with respect to this crime, which as we all know was described by the Nuremburg Tribunal as comprising in “... *the supreme international crime, differing only from other war crimes, in that it contains within itself the accumulated evil of the whole ...*” , into a political play thing, and the Court itself, into a political tool of the most powerful states in today’s world. The majority of whom are themselves yet to sign and ratify the Rome statute, yet alone show themselves willing to subject their own political and military leadership to the potential jurisdiction of the Court with respect to this supreme crime.

As I say I take the view that the drafters of both the United Nations and the Nuremburg Charters, in 1945, sought thereby to facilitate the creation of a new world order in which this crime, above all else, would be outlawed permanently and whose judicial determination and punishment would be made subject to no political interference whatever ; such that the community of nations comprising the civilised world could unite through their common desire for peace through justice, rather than subject to the machinations of political fear and favour. These are the established immediate post-war precedents of the P5 states which I, as a citizen-subject of one such nation state, happily prefer to say continues down unto this day to more accurately reflect the true peace and justice loving aspirations of the British people.

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