

When Law And Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression

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As we approach the 10 year anniversary of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and the first Review Conference looms in the foreseeable future, it seems that the States Parties to the Rome Statute¹ are still some way off finding acceptable solutions to the definitional and jurisdictional issues surrounding the crime of aggression. In relation to the jurisdictional issue, the focus of this article, the current state of play sees a significant number of States maintaining their argument that only the Security Council has the ability to determine the occurrence of a State act of aggression. These States contend that the International Criminal Court should only be able to exercise jurisdiction over the crime of aggression once the Council has made a determination as to the occurrence of an act of aggression, which would be binding on the Court. This would mean that the Court would only make determinations as to what have been termed the ‘leadership elements’ of the crime, and possibly, depending on the definition of the State act element of the crime ultimately adopted, any requirements additional to the simple occurrence of an act of aggression, such as whether the act of aggression amounts to a ‘manifest’ violation of the Charter.² The opposing camp argue that there is no support in law for the contentions of Security Council determinists and assert that in order to maintain ICC independence and protect the rights of accused persons, the ICC itself must determine all elements of the crime. Attempts have been made to bridge the distance between these two groups in the form of

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¹ *Rome Statute of the International Criminal Court*, signed 17 July 1998, 2187 UNTS 90 (entry into force 1 July 2002).

² See for example *Discussion Paper on the Crime of Aggression proposed by the Chairman*, UN Doc. ICC-ASP/5/SWGCA/2 (2007), 3 (2007 Chairman’s Discussion Paper).

compromise proposals, including the suggestion that the Security Council determine the occurrence of an act of aggression only as a precondition to the activation of the Court's jurisdiction, allowing the Court to make a second, independent determination in the course of the trial of an accused. Other proposals would place time limits on the Council's ability to make the requisite determination, or seek to involve other organs of the United Nations.³

This article will provide an analysis of the legal arguments that have been put forward in favour of exclusive Security Council determination and argue that they are flawed. In recognition that negotiations relating to the crime of aggression are influenced as much by politics as they are by law, policy arguments will also be addressed. It will be demonstrated that while these also objectively favour ICC determination, *realpolitik* means it is unlikely provisions based on independent ICC determination will be adopted. The article thus evaluates existing compromise proposals and concludes by offering a new compromise solution to the jurisdictional impasse.

1. An analysis of jurisdictional issues through a legal lens

1.1 An interpretation of Article 5(2) of the Rome Statute

The starting point for an analysis of the jurisdictional issues surrounding the crime of aggression is logically Article 5(2) of the Rome Statute, which provides that any provision adopted setting out the conditions under which the Court shall exercise jurisdiction over the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations".

Franklin Berman (head of the UK Delegation to the Rome Conference) has written that the last sentence of Article 5(2) is "coded language for what became known at the

³ See in particular: *ibid* and *Proposal submitted by Greece & Portugal*, UN Doc PCNICC/1999/WGCA/DP.1 (1999); PCNICC/2000/WGCA/DP.5 (2000); *Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania* UN Doc PCNICC/2001/WGCA/DP.1 (2001); *Proposal by the Netherlands concerning PCNICC/2002/WGCA/RT.1*, UN Doc PCNICC/2002/WGCA/DP.1 (2002).

conference as the ‘Security Council trigger’.⁴ This echoes the official UK position. In the final plenary meeting of the Conference, after the adoption of the Statute, *Berman* stated on behalf of the UK that it “interpreted the reference to aggression in article 5 and, in particular, the last sentence of paragraph 2 of that article, which mentioned the Charter, as a reference to the requirement of prior determination by the Security Council that an act of aggression had occurred.”⁵

This interpretation of Article 5(2) is widely shared.⁶ On the other hand, former US Ambassador-at-Large for War Crimes and head of the US Delegation to Rome, *David Scheffer*, has referred to the “opacity” of Article 5(2) on this point as one of the reasons why the US voted against the adoption of the Statute.⁷ Indeed, it seems clear that the last sentence of Article 5(2) was deliberately drafted to be ambiguous. It had to be in order to ensure that a sufficient number of States voted in favour of the adoption of the Statute. For Article 5(2) had to accommodate not only those States in favour of Security Council determination, but also the large number of States that opposed any special role for the Council in the prosecution of crimes of aggression.

Consistency with the UN Charter is a basic principle underlying the whole of the Rome Statute⁸ and a notion no State is likely to object to. Proponents of Security Council

⁴ *Sir Franklin Berman*, ‘The Relationship between the International Criminal Court and the Security Council’ in H. A. M. Von Hebel, J. G. Lammers and J. J. Schukkina (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 178.

⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Record of the 9th Plenary Meeting*, UN Doc. A/CONF.183/SR.9 (1999), 7.

⁶ See for example *Theodor Meron*, ‘Defining Aggression for the International Criminal Court’ (2001) 25 *Suffolk Transnational Law Review*, 1, 2; *Andrew L. Paulus*, ‘Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis’ (2004) 50 *Wayne Law Review*, 1, 21; *Matthias Schuster*, ‘The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword’ (2003) 14 *Criminal Law Forum*, 1, 14; *A. Zimmermann*, ‘Article 5’ in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (1999) 97, 106.

⁷ Cited in *William A. Schabas*, ‘The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They are Forever Banned?’ in Dominic McGoldrick, Peter Rowe & Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 123, 135.

⁸ Consistency with the Charter is reflected in provisions such as Article 13(b) allowing for Security Council referral, Article 16 allowing for Security Council deferment of investigations and

determination and their opponents, however, have different interpretations of the Charter when it comes to the power of the Security Council to identify a State act of aggression for the purpose of criminal prosecution. This issue will be addressed below. In the interim, it can be concluded that while Article 5(2) of the Rome Statute can be invoked to support Security Council determination, it is by no means conclusive, or even compelling, on this point.

1.2 Does the UN Charter give the Security Council the exclusive authority to determine the occurrence of an act of aggression?

1.2.1 The case for exclusive Security Council determination under the law of the Charter

Without doubt, Article 39 of the UN Charter grants the Security Council the power to identify acts of aggression. It provides that: “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.”

According to proponents of Security Council determination, the mandatory language of Article 39 gives the Council the exclusive ability to identify the occurrence of a State act of aggression.⁹ This interpretation is generally underscored by an assertion that a determination of the occurrence of an act of aggression under Article 39 is a political question, not a legal one. During the International Law Commission’s debates over the Draft Code of Offences against the Peace and Security of Mankind, one member of the Commission articulated the extreme of this view, asserting that the crimes of aggression

prosecutions, Article 87(5)(a) relating to Security Council notification of the failure of States to cooperate and Article 119 allowing for the referral of disputes to the ICJ.

⁹ See for example, *Theodor Meron*, above n6, 5; *Benjamin B. Ferencz*, ‘Can Aggression be Deterred by Law?’ (1999) 11 *Pace International Law Review*, 341, 355-356; Response of the United Kingdom to Discussion Paper Prepared by Pál Wrange, document distributed to members of the SWGCA during its Intersessional Meeting, 8-11 June 2006, Princeton University, New Jersey, on file with author, 18.

and threat of aggression “were *sui generis* in that, by definition, they existed only if the Security Council characterized certain acts as such.”¹⁰ More specifically it has been contended that: “...the question of whether a certain situation is a threat to the peace or a breach of the peace or involves an act of aggression is a non-justiciable question. It is a question that cannot be answered by recourse to legal reasoning as there are no legal standards by which to reach a decision. It involves a political decision as to factual matters and is in no way constrained by legal considerations.”¹¹ In other words, according to this view, the determination that an act of aggression has occurred involves more than normative considerations - and in particular involves more than the satisfaction of legal criteria. The assessment requires an evaluation of the facts and an appraisal of the international political situation to see both whether a particular label is justified and whether the interests of international peace and security will be furthered by the adoption of such a label. This, it is contended, is a job for a political, not judicial, body.¹²

Some evidence has been proffered (in an ad-hoc manner) to support this view.¹³ Firstly, it is noted that the term ‘act of aggression’ is not defined in the Charter. The omission of a definition, it is noted, was deliberate. At the United Nations Conference on International Organisation (UNCIO) held in April 1945, several delegations called for the definition of the terms ‘threat to the peace’, ‘breach of the peace’ and ‘act of aggression’, in order to provide a minimum guideline for Security Council action.¹⁴ Bolivia and the

¹⁰ *Report of the International Law Commission on the Work of its Forty-Third Session*, UN GAOR, 46th sess, supp no 12, UN Doc. A/46/10 (1991), 92.

¹¹ *Dapo Akande*, ‘The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations’ (1997) 46 *International and Comparative Law Quarterly*, 309, 338.

¹² *Keith Harper*, ‘Does the United Nations Security Council Have the Competence to Act as Court and Legislature?’ (1994-1995) 27 *NYU Journal of International Law and Politics*, 103, 135.

¹³ It should be noted that several of the supporting arguments outlined below have been submitted in the context of the judicial reviewability of Security Council decisions debate, rather than in relation to the jurisdictional issues surrounding the crime of aggression. Proponents of Security Council determination rarely advance their argument past their interpretation of Article 39. Arguments advanced in the judicial review debate that could be applied to the case for Security Council determination have been included so as to present that case at its highest in order to properly test its merit.

¹⁴ *Report of Mr Paul-Boncour, Rapporteur on Ch VIII, Section B, Doc. 881, III/3/46 (1945)* reproduced in *Benjamin B. Ferencz*, *Defining International Aggression: The Search for World Peace: A Documentary History and Analysis* (1975), 349-352.

Philippines made concrete definitional proposals.¹⁵ These were hotly debated, but ultimately both the specific proposals and the suggestion that the terms needed definition in the Charter were rejected. The report of Mr Paul-Boncour, Rapporteur for the Committee responsible for finalising the draft text of what would become Chapter VII of the Charter, explains that “The Committee...decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression.”¹⁶ Thus it is argued that the travaux préparatoires support an interpretation of Article 39 that gives the Security Council the sole right to identify an act of aggression.

Some obiter comments of individual judges of the International Court of Justice can in addition be read as supporting the idea that the Council has an exclusive discretion to determine the existence of an act of aggression. The strongest example¹⁷ is found in the Dissenting Opinion of Judge Weeramantry in the Provisional Measures phase of the *Lockerbie Case*, where His Honour held that: “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

¹⁵ See United Nations Conference on International Organisation, *Proposals of the Delegation of the Republic of Bolivia for the Organisation of a System of Peace and Security and Proposed Amendments to the Dumbarton Oaks Proposals Submitted by the Philippine Delegation*, 5 May 1945 reproduced in *ibid*, 313-321 and 322-327.

¹⁶ *Report of Mr Paul-Boncour*, above n14, 352.

¹⁷ See also: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro)* Further Request for the Indication of Provisional Measures, ICJ Rep [1993] 325 per Judge Lauterpacht, Separate Opinion, 439; and *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, *Preliminary Objections*, ICJ Rep [1998] 115, per President Schwebel, Dissenting Opinion, 171.

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.”¹⁸

Similarly, in the *Kanyabashi Case*, the International Criminal Tribunal for Rwanda found that: “...the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber.”¹⁹ The comments of the Court could arguably be extrapolated to apply equally to acts of aggression.

It is asserted that the political nature of Article 39 determinations is further illustrated by the Permanent Five’s veto power, exercisable in relation to substantive questions, which certainly includes the characterisation of a situation or incident as an act of aggression under Article 39. In this context it is argued that the “...structural bias in favour of the major powers is a clear indication that decisions in the interest of peace and security will be based exclusively on (national) political considerations.”²⁰

According to proponents of Security Council determination, the fact that the identification of an act of aggression would be for the purpose of enabling the ICC’s jurisdiction over the crime of aggression, rather than as a precursor to traditional enforcement action under Chapter VII, is immaterial. They assert that any distinction drawn between the varying purposes of determinations is artificial.²¹ Of assistance in this context is Kelsen’s interpretation of Article 39, which he says allows the Council to make recommendations “of any kind” after characterising a given situation as a threat to, or

¹⁸ *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) Provisional Measures*, ICJ Rep [1992] 3, 66.

¹⁹ *Prosecutor v Joseph Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction*, 18 June 1997, para 20.

²⁰ *Erika De Wet*, The Chapter VII Powers of the United Nations Security Council (2004), 134-135.

²¹ Comments made by delegates to the Intersessional Meeting of the SWGCA, 8-11 June 2006, Princeton University, New Jersey, notes on file with author.

breach of, the peace, or an act of aggression;²² in other words, according to *Kelsen*, the Council is not limited to taking enforcement measures under Articles 41 and 42, a view that has been confirmed by Security Council practice since 1945.

At any rate, many agree that identifying an act of aggression for the purpose of enabling the ICC's jurisdiction over the crime of aggression would fall under the ambit of Article 41 of the Charter. Article 41 lists several specific non-military enforcement measures open to the Council. It is widely accepted that the list included in Article 41 is illustrative only, and that under the Article the Council can take any measure not involving the use of force that it deems useful for the maintenance or restoration of international peace and security.²³ The link between international peace and security and the prosecution of international crimes was firmly asserted by the Council when it established the International Criminal Tribunal for the former Yugoslavia. The validity of the link was confirmed by the Appeals Chamber of the ICTY in the *Tadic Case*, which held that the Tribunal's establishment fell "squarely within the powers of the Security Council under Article 41."²⁴

Any distinction made between the establishment of an ad-hoc international criminal tribunal set up to deal with a region engaged in ongoing conflict and an ongoing role for the Council in the prosecution of individual cases of criminal responsibility attached to State acts of aggression has also been rejected. According to *Trahan*, this is because any determination as to the existence of a State act of aggression made in the course of the

²² *Hans Kelsen*, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), 438.

²³ *Jochen Frowein & Nico Krisch*, 'Article 41' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002), 740. According to the Appeals Chamber of the ICTY in the *Tadic Case*: "It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition...The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be." (*Prosecutor v Dusko Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Tadic Case)*), para 35).

²⁴ *Ibid*, para 36.

prosecution of the crime of aggression would “inherently imply that a state did in fact commit aggression”.²⁵

The history of Security Council practice readily demonstrates that the Council has interpreted its own role in relation to the maintenance of international peace and security in an increasingly broad manner. Gaining leverage from this, proponents of Council determination often bolster their case by reference to Article 24(1), which 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, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

Article 24 is used to argue that any measure contributing to the prosecution of international crimes falls within the ambit of maintaining international peace and security, and that the express terms of the Charter outline the Council’s “primary responsibility” in relation to such matters. In this context, reference has been made to Article 12(1) of the Charter under which the GA is, at least in theory, barred from making recommendations in respect of any dispute or situation while the Security Council is exercising its functions in respect of the same.²⁶ “Thus”, *Schuster*, for example, asserts: “...if an intrinsic organ of the United Nations cannot act independently of the Security Council, it is unrealistic to assume that the International Criminal Court – being a treaty organization outside the Charter – can possess powers that are broader than those of such an organ.”²⁷

The final important element of the case argued by proponents of Security Council determination rests on Article 103 of the UN Charter. Article 103 states that: “In the

²⁵ *Jennifer Trahan*, ‘Aggression: Why the Preparatory Commission for the International Criminal Court has Faced Such a Conundrum’ (2002) 24 *Loyola of Los Angeles International and Comparative Law Review*, 439, 464.

²⁶ Article 12(1) provides that: ‘While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so request.’

²⁷ *Matthias Schuster*, above n6, 15.

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

The first-string argument relating to Article 103 flows from the above-outlined interpretation of Articles 24 and 39 of the Charter. It is argued simply that any provision in the Rome Statute that granted the ICC jurisdiction to determine the existence of a State act of aggression would conflict with Articles 24 and 39, which grant the Security Council the exclusive ability to determine the existence of acts of aggression and establish an obligation of the Member States to uphold the Security Council’s rights. A more sophisticated argument relates to any specific resolution that might be adopted by the Security Council that clearly identified an act of aggression. On the basis of Article 25, it is claimed that a resolution determining the existence of aggression would be binding on the Member States of the United Nations and therefore all States Parties to the Rome Statute.²⁸ The thrust of this argument is seemingly that any ICC judgment that reached a different conclusion to a Security Council resolution in relation to the occurrence or otherwise of an act of aggression would create inconsistent obligations and therefore be unenforceable pursuant to Article 103 of the Charter.

This is the case of exclusive Security Council determination at its highest. It relies on little authority beyond an interpretation of Articles 39, 24 and 103 of the UN Charter. The following section of this article will determine whether or not that interpretation can withstand legal analysis.

1.2.2 The case against exclusive Security Council determination under the law of the Charter

In looking for the ordinary meaning of Article 39,²⁹ the first thing that should be noted is that the Charter speaks of the Council identifying ‘*the existence of*’ acts of aggression,

²⁸ *Ibid*, 16.

²⁹ On the principles of the interpretation of the UN Charter, see *Competence of the General Assembly for the Admission of a State to the United Nations* ICJ Rep [1950] 4, 8; Georg Ress, ‘The

not ‘*the occurrence*’ of such acts. The distinction appears to be important in the context of the following Articles in Chapter VII, which outline the measures that may be taken by the Security Council in order to maintain or restore international peace and security. In this setting, Article 39 appears to confine the Security Council’s ability to identify acts of aggression to those that are on-going, or at least the after-effects of which are still causing a serious disruption to international peace and security. In other words, Article 39 does not appear to contemplate the Security Council’s identification of stale acts of aggression,³⁰ something which could well feature in trials relating to the crime of aggression given the likely passage of time before attention shifts from stabilising the international security situation to criminal justice in scenarios involving crimes of aggression and the likely time involved in gathering and processing the enormous amounts of evidence and witnesses likely to be involved in the prosecution of any crime of aggression.

It might also be noted that Article 39 is completely silent as to individual criminal responsibility.³¹ Indeed, the apparent purpose of an Article 39 determination is to lay the basis for either the making of recommendations, or deciding what measures to take to maintain or restore international peace and security. As *Nsereko* notes, read in context, the verb ‘shall’ “should be understood to mean that the Council must make the determination as a prelude to making its recommendations or decisions on enforcement measures”.³² It should not be read as requiring or allowing only the Council to make such determinations. While it can be agreed that the mandatory language of Article 39 precludes both other UN organs and external treaty bodies from identifying acts of aggression in order to trigger the Security Council’s responsibilities, it cannot be read as

Interpretation of the Charter’ in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., 2002) 13, 18-19.

³⁰ *Mark S. Stein*, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’ (2005) 16 *Indiana International and Comparative Law Review*, 1, 5.

³¹ *Paula Escarameia*, ‘The ICC and the Security Council on Aggression: Overlapping Competencies?’ in M. Politi & G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (2004) 133, 137.

³² *Daniel D. Ntanda Nsereko*, ‘Aggression under the Rome Statute of the International Criminal Court’ (2002) 71 *Nordic Journal of International Law*, 497, 506. See also *Andreas L. Paulus*, above n6, 21.

prohibiting all entities other than the Council from identifying acts of aggression for purposes other than triggering Security Council action.³³

In relation to Article 24 of the UN Charter, which provides the Council with its “primary responsibility” in respect of the maintenance of international peace and security, it must firstly be noted that the ICJ has stressed that the responsibility conferred by the Article is *only* ‘primary’ – not exclusive.³⁴ Moreover, the ICJ has noted that the responsibility is conferred, as stated in the Article, “in order to ensure prompt and effective action.”³⁵ This again favours an interpretation that the Council’s prime role is related to its prerogative to take action in respect of security crises, not to make binding decisions in relation to international criminal prosecutions.

The ICJ’s findings in relation to the division of responsibilities for the maintenance of international peace and security requires further analysis for it has implications for the ability of entities other than the Security Council to identify an act of aggression under the UN Charter. In the *Certain Expenses Case*, the ICJ was asked for an advisory opinion as to whether or not expenditures authorised in certain GA resolutions relating to UN military operations in the Middle East and in the Congo were “expenses of the Organization” within the meaning of Article 17(2) of the Charter.³⁶ One of the central arguments before the Court was that operations for the maintenance of international peace and security could only be financed via Article 43 agreements initiated by the Security Council, not through apportionment by the General Assembly pursuant to Article 17. The Court rejected this argument, holding that the Charter makes it “abundantly clear” that the GA, as well as the Security Council, is to be concerned with

³³ Mark S. Stein, above n30, 5.

³⁴ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports [1962] 151, 163 (Certain Expenses Case); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* ICJ Rep [1984] 392, 434 (Nicaragua (Jurisdiction)); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* ICJ Rep [2004] 136, 148.

³⁵ *Certain Expenses Case*, above n34, 163; *Nicaragua (Jurisdiction)*, above n34, 434.

³⁶ The opinion was sought as a result of the financial difficulties posed by the UN’s operations in the Suez and the Congo. A number of Member States, including the Soviet Union, contended that the operations had not been undertaken in conformity with the UN Charter and thus refused to make contributions to the costs of the operations that had been budgeted for by the GA.

international peace and security, and that, outside of the restrictions imposed by the last sentence of Article 11(2),³⁷ the GA has the power under that Article to establish peacekeeping operations.³⁸ In relation to the limiting provision of Article 11(2), the Court found that the ‘action’ referred to in the Article refers to “coercive or enforcement action” or “such action as is solely within the province of the Security Council”, which it described as “that which is indicated by the title of Chapter VII of the Charter, namely ‘Action with respect to threats to the peace, breaches of the peace and acts of aggression.’”³⁹ The Court concluded that the last sentence of Article 11(2) “has no application where the necessary action is not enforcement action.”⁴⁰ According to the Court, the establishment,⁴¹ supervision and financing of the UN operations in question did not constitute ‘enforcement action’ against any State, as they involved only peace-keeping (as distinct from peace-enforcement) and were established with the consent of the States concerned.⁴² In the course of its judgment, the Court also acknowledged the fact that the Assembly had not specifically relied upon Article 11(2) and that the relevant resolutions pertaining to the operations could have been validly adopted under Article 14,⁴³ which is limited only by Article 12(1).⁴⁴

In an analysis of the judgment, and specifically the Court’s interpretation of the term ‘action’ in Article 11(2), *Donat Pharand* has written that: “The only difficulty which results from this interpretation is that, admitting that a simple ‘threat to the peace’ demands ‘action’ by the Security Council, the kind of circumstance justifying ‘action’ by the General Assembly must be something less than a simple ‘threat to the peace’. More

³⁷ The relevant limitation provides that: “Any such question [relating to the maintenance of international peace and security] on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.”

³⁸ *Certain Expenses Case*, above n34, 163.

³⁹ *Ibid*, 165.

⁴⁰ *Ibid*, 164-165.

⁴¹ It should be noted that the ONUC was established by the Security Council before it handed over operations to the General Assembly. UNEF was established by the General Assembly.

⁴² *Certain Expenses Case*, above n34, 171, 176-177.

⁴³ Article 14 provides that: “Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.”

⁴⁴ *Certain Expenses Case*, above n34, 172.

specifically, it must be only a ‘dispute’ or a ‘situation’, the latter being something less again.”⁴⁵

This categorisation of events justifying ‘action’ appears to have been based on Article 34 of the Charter, which seemingly draws a distinction between disputes and situations on the one hand, and the triumvirate in Article 39. Leaving aside the difficulties posed by the Charter’s problematical use of different but closely related terms, what is interesting about Pharand’s analysis is that it assumes either that: (i) if a threat to, or breach of, the peace, or act of aggression is identified, the only type of action that can be taken in response is ‘enforcement action’; or (ii) the GA is prohibited by Article 11(2) from determining the existence of threats to, or breaches of, the peace, or acts of aggression, either because such a determination itself constitutes enforcement action or for some other reason that is not specified. It is submitted that such assumptions are incorrect and that in fact, the discussion of the General Assembly’s role in relation to the maintenance of international peace and security in the *Certain Expenses Case* points to the possibility of at least the GA, in addition to the Council, being empowered to identify the occurrence of acts of aggression.

Firstly, although the identification of a threat to, or breach of, the peace, or act of aggression under Article 39 entitles enforcement action under Articles 41 or 42 to be taken, the Security Council is also separately empowered by Article 39 to “make recommendations” to maintain or restore international peace and security after making such an identification. Neither Article 39 nor any other provision in the Charter directly limits the type of recommendation that may be made. In particular it is unquestionably within the power of the Council to establish a peace-keeping force at the request of an affected State or States after making a determination that a threat to, or breach of, the peace, or act of aggression exists. According to the ICJ, such action falls outside of the definition of ‘enforcement action’. Thus, assumption (i) is demonstrably incorrect.

⁴⁵ A. Donat Pharand, ‘Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations’ (1963) 1 *Canadian Yearbook of International Law*, 272, 285.

In relation to assumption (ii), it is difficult to accept that the making of a determination that a threat to, or breach of, the peace, or act of aggression constitutes ‘enforcement action’ if the establishment of a peace-keeping force with the consent of affected States does not. Moreover, at least one of the resolutions before the ICJ in the case characterised the situation in the Congo as a threat to the peace. Perambulatory paragraph 2 of Resolution 1600 (XV)⁴⁶ stated that the Assembly was “Gravely concerned at the danger of civil war and foreign intervention and at the threat to international peace and security.” Thus, although not in an operative paragraph of a resolution, there seems to have been evidence of a GA determination that a threat to the peace existed before the Court. The making of this determination was not remarked upon by the ICJ as constituting ‘enforcement action’ or being otherwise *ultra vires* or inappropriate.

The foregoing interpretation of the *Certain Expenses Case* is borne out by UN practice. In 1950, the GA adopted the *Uniting for Peace Resolution*,⁴⁷ which provides: “...if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”

Aimed primarily at overcoming any hurdle posed by Article 12(1), the resolution allows the GA to make recommendations if the exercise of a veto prevents the Security Council from making a decision. Importantly for current purposes, the resolution clearly implies an ability of the GA to determine the existence or occurrence of acts of aggression. If it did not have this power, how could the Assembly properly determine whether or not it

⁴⁶ *Resolution on the situation in the Republic of the Congo*, GA Res 1600, UN GAOR, 15th Sess, 985th plen mtg, UN Doc A/Res/1600 (1961).

⁴⁷ *Uniting for Peace Resolution*, GA Res 377, Un GAOR, 5th Sess, 302nd plen mtg, UN Doc A/Res/377 (1950).

was appropriate to make a recommendation relating to the use of armed force to maintain or restore international peace and security?

A review, moreover, of General Assembly resolutions demonstrates that in practice, the Assembly has determined that certain uses of force constituted acts of aggression. A notable example is found in Resolution 498 of 1 February 1951 in which the Assembly: “Finds that the Central People’s Government of the People’s Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea.”⁴⁸

Other examples include:⁴⁹

- Resolution 2508 of 21 November 1969, which condemned the intervention of South African armed forces in Southern Rhodesia, which the Assembly held constituted “an act of aggression against the people and territorial integrity of Zimbabwe...”,⁵⁰ well before the Security Council adopted any resolution describing South Africa’s activities as acts of aggression;
- Resolution 36/27 of 13 November 1981, which described Israel’s attack on Iraqi nuclear installations as “an act of aggression”;⁵¹ and

⁴⁸ *Resolution on the Intervention of the Central People’s Government of the People’s Republic of China in Korea*, GA Res 498, UN GAOR, 5th Sess, 327th plen mtg, UN Doc A/Res.498 (1951).

⁴⁹ See also in particular *Resolution on the illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic*, GA Res 3061, UN GAOR, 28th sess, 2163rd plen mtg, UN Doc. A/RES/3061 (1973) referring to acts of aggression committed by Portugal against the people of Guinea-Bissau and Cape Verde; *Resolution on the policies of apartheid of the Government of South Africa*, GA Res 3151, UN GAOR, 28th sess, 2201st plen mtg, UN Doc A/Res/3151 (1973) referring to South Africa’s aggression and aggressive acts before they were described as such by the Security Council; and *Resolution on the question of Namibia*, GA Res 43/26, UN GAOR, 43rd sess, 54th plen mtg, UN Doc A/Res/43/26 (1988), which declares that “South Africa’s illegal occupation of Namibia constitutes an act of aggression against the Namibian people in terms of the Definition of Aggression contained in [...resolution 3314]...”.

⁵⁰ *Resolution on the question of Southern Rhodesia*, GA Res 2508, UN GAOR, 24th sess, 1816th plen mtg, UN Doc A/Res/2508 (1969).

⁵¹ *Resolution on armed Israeli aggression against the Iraqi nuclear installations*, GA Res 32/27, UN GAOR, 36th sess, 56th plen mtg, UN Doc A/Res/36/27 (1981).

- Resolution ES-9/1 of 5 February 1982, in which the GA declared that “Israel’s decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Syrian Golan Heights constituted an act of aggression under the provisions of Article 39 of the Charter of the United Nations and General Assembly resolution 3314 (XXIX)”.⁵²

Thus the Assembly appears to be firmly of the view that it has the ability to determine that an illegal use of force constitutes an act of aggression. In this context it might in addition be noted that the Assembly has departed from the text of Article 12(1) of the Charter and has made recommendations on issues with which the Council was dealing quite actively.⁵³ In 1968, the Legal Counsel of the United Nations expressed the view that the GA had consistently interpreted the expression “is exercising the functions” in Article 12(1) to mean “is exercising the functions at this moment”.⁵⁴ There has been no recorded protest of the Security Council in relation to this practice and recently in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case*, the ICJ confirmed that “the accepted practice of the General Assembly, as has evolved, is consistent with Article 12, paragraph 1, of the Charter”.⁵⁵ Thus, any argument as to the need for the ICC to be subservient to the Council based on Article 12(1) may be considered to be somewhat nullified by the practical interpretation of the provision.

A long line of authority, beginning with the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,⁵⁶ has established the general ability of the ICJ to deal with legal questions arising from situations being simultaneously dealt with by the Security Council. Thus in the *Tehran Case*, the ICJ considered its ability to give judgment on the

⁵² *Resolution on the situation in the occupied Arab territories*, GA Res ES-9/1, 9th Emergency Special Sess, 12th plen mtg, UN Doc A/Res/ES-9/1 (1982).

⁵³ *Kay Hailbronner & Eckart Klein*, ‘Article 12’ in B. Simma (ed.) *The Charter of the United Nations: A Commentary* (2nd ed, 2002) 287, 293.

⁵⁴ Twenty-Third General Assembly, 3rd Committee, 1637th Meeting, UN Doc. A/C.3/SR.1637, para 9.

⁵⁵ (*Advisory Opinion*) ICJ Rep [2004] 136, 150.

⁵⁶ (*United States v Iran*) *Judgment*, ICJ Rep [1980] 3 (*Tehran Hostages Case*).

merits in light of its finding that the Security Council was actively seized of the situation at the time when the Court had declared itself competent to entertain the United States' request for provisional measures and while judgment was pending, as demonstrated by the adoption of Resolutions 457 (1979)⁵⁷ and 461 (1979).⁵⁸ The Court noted that the Security Council had taken into account the Court's Order of 15 December 1979 indicating provisional measures and commented that it was not surprising that it did not occur to any member of the Council that "there was or could be anything irregular in the simultaneous exercise of their respective functions", given the lack of restriction found in the Charter or ICJ Statute on the functioning of the Court.⁵⁹ The reason for the absence of such a restriction, according to the Court, is "clear", for it found that: "it is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between the parties to a dispute...".⁶⁰ Similar conclusions were reached in the *Genocide Case*,⁶¹ and in the *Case Concerning Armed Activities on the Territory of the Congo*.⁶²

Case law thus demonstrates that in general, the ICJ and the Security Council may have overlapping jurisdictions. The Court in the *Tehran Case* did not restrict the types of issues in respect of which both the Court and the Council have the ability to deal. Rather, the Court stated that it has the ability to decide 'any legal questions' that may arise between the parties to a dispute before it. Certainly the decision does not deal with the specific ability or lack thereof of the Court to determine that an act of aggression has occurred. If, however, we accept for the time being that the question of whether or not an act of aggression has occurred is a *legal* question, there is nothing in the decision that points to this particular legal question being excluded from the jurisdiction of the Court.

⁵⁷ SC Res 457, UN SCOR, 2178th mtg, UN Doc S/Res/457(1979).

⁵⁸ SC Res 461, UN SCOR, 2184th mtg, UN Doc S/Res/461 (1979).

⁵⁹ *Tehran Hostages Case*, above n56, 21.

⁶⁰ *Ibid*, 22.

⁶¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Yugoslavia, Serbia and Montenegro) (Provisional Measures)*, ICJ Rep [1993] 3, 18.

⁶² *(Democratic Republic of the Congo v Uganda) (Provisional Measures)* ICJ Rep [2000] 111, 126-127.

The issue arose more directly in the pre-hearing challenge to admissibility and jurisdiction in the *Nicaragua Case*. Before the ICJ, the United States submitted that Nicaragua's Application was inadmissible because it amounted to a claim that the US was engaged in an unlawful use of armed force, a breach of the peace, or an act of aggression against Nicaragua. Relying on Article 24 of the Charter, the US submitted that such a determination was committed "by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council."⁶³ The US supported its submission by noting that the Council had acted and was continuing to act in respect of virtually identical claims placed before it by Nicaragua⁶⁴ and outlined its concern that Nicaragua's Application was in effect seeking to appeal an adverse decision of the Council.⁶⁵

In rejecting the US' submissions, the Court referred to its earlier decision in the *Tehran Hostages Case* and held 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*."⁶⁶ It then rejected the US' construction of Nicaragua's case as invoking a charge of "aggression and armed conflict envisaged in Article 39..."⁶⁷ While acknowledging that the matter had been discussed in the Security Council, the Court noted that "no notification has been given to it [the Security Council] in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the US, but one requiring, and indeed demanding, the peaceful settlement of disputes between two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement."⁶⁸

⁶³ *Nicaragua (Jurisdiction)* above n34, 431.

⁶⁴ *Ibid*, 432.

⁶⁵ *Ibid*, 432-433.

⁶⁶ *Ibid*, 433.

⁶⁷ *Ibid*, 434.

⁶⁸ *Ibid*.

While the Court's statement is not without ambiguity, the Court appears to have held that, as no Article 39 determination had been made by the Council characterising the US' use or threat of the use of force against Nicaragua as an act of aggression, it was appropriate for the dispute to be dealt with by the Court in order to reach a peaceful settlement. Implicitly, the Court also appears to be saying that Nicaragua's Application raised a legal question separate to whether or not an act of aggression had been committed: namely, the question of whether or not the United States had breached the prohibition against the use of force. The Court appears to hold that the two questions cannot be equated. This could be because the Court viewed the constitutive elements of an act of aggression and a breach of the prohibition as qualitatively or quantitatively different, or it could be because the Court viewed the question of whether or not an act of aggression has been committed as being solely relevant to the institution of measures under Chapter VII. It is, unfortunately, not possible to do anything more than speculate on the basis of the Court's written judgment.

Regardless, it is submitted that neither interpretation militates in favour of an exclusive ability of the Security Council to determine the existence of an act of aggression.⁶⁹ The Court merely held that a determination as to State responsibility for a breach of the prohibition against the use, or threat of the use, of force did not require a determination as to the existence or occurrence of an act of aggression. Firstly, on the basis of customary international law pertaining to State responsibility, it was clearly possible for the Court to determine whether the prohibition had been breached without determining whether the breach in question met the definition of an act of aggression. And secondly, even if in 1984, the existence or occurrence of an act of aggression was seen as being only relevant to Article 39 determinations, this is not to say that if the occurrence of an act of aggression was included as the State act element of a crime within the competence of the ICC, that it would be then a matter with which only the Security Council could deal.

Indeed, after the passage quoted above, the Court went on to stress the overlapping jurisdictions of the Court and the Council in connection with uses of armed force. It

⁶⁹ For the contrary view see *Matthias Schuster*, above n6, 19.

noted again that the Charter “does not confer *exclusive* responsibility upon the Security Council” for the maintenance of international peace and security and noted the absence of a provision parallel to Article 12 of the UN Charter applying to the ICJ.⁷⁰ In this respect the Court held that: “The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.”⁷¹

Referring to the *Corfu Channel Case*⁷² the Court noted that it had “never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.”⁷³ And in relation to the US contention that Nicaragua’s Application amounted to an appeal from an adverse decision of the Security Council, the Court held that it was: “not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations.”⁷⁴

Thus, while the Court failed to make any definitive statement, it is submitted that the emphasis placed on the differing roles of the Council and the Court suggests that were the occurrence of an act of aggression relevant to a case referred to the Court by parties pursuant to Article 36(1) of the Statute, or the subject of an advisory opinion submitted under Article 65, the Court would be competent to make such a determination.

As is well known, at the merits stage of the *Nicaragua Case*, the Court’s majority found that the United States had acted against Nicaragua in breach of its obligation under

⁷⁰ *Nicaragua (Jurisdiction)*, above n34, 434-435.

⁷¹ *Ibid*, 435.

⁷² *Corfu Channel (United Kingdom v Albania) (Merits)* ICJ Rep [1949] 4.

⁷³ *Nicaragua (Jurisdiction)*, above n34, 435.

⁷⁴ *Ibid*, 436. As to justiciability see also *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Merits)* ICJ Rep [1986] 14, 27 (Nicaragua (Merits)).

customary international law not to use force against another state.⁷⁵ The Court made no explicit finding as to whether or not the breach constituted ‘an act of aggression’.⁷⁶ The Merits decision of the majority thus sheds little light on the issue of the conditions under which the ICC can exercise jurisdiction over the crime of aggression. The question of the ability of the ICJ to identify acts of aggression was, however, addressed directly in the Dissenting Opinion of Judge Schwebel.⁷⁷ The importance of His Honour’s findings warrant their extensive quotation:

“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.

“57. It may well be, as counsel of the United States argued, that, “It was simply never considered at the San Francisco Conference that the Court would, or should, have the competence to engage in such matters.” It may well be that, had the question been squarely and searchingly engaged, there would have been a decision to exclude from the competence of the Court the authority to give judgment on matters which were before the Security Council under Chapter VII, or which involved the continuing use of armed force in international relations. Certainly the argument is plausible that no Power enjoying the veto right in the Security Council contemplated that, whereas the exercise of that right could block adoption of any charge of aggression against it in the Security Council, it

⁷⁵ *Ibid*, 123, 146.

⁷⁶ There is room to argue that the Court equated armed attacks with acts of aggression in distinguishing between the most grave and less grave forms of the use of force. See *ibid*, 191 and 195.

⁷⁷ In the course of his Dissenting Opinion Judge Oda found that: “...a dispute in which use of force is resorted to is in essence and *in limine* one most suitable for settlement by a political organ such as the Security Council, but is not necessarily a justiciable dispute such as falls within the proper functions of the judicial organ.” (240). His Honour continued, however, holding that: “I certainly am not suggesting any principle that, once a dispute has been brought before the Security Council...it cannot or should not be dealt with by the Court...Yet...the States Members of the...United Nations, have always been aware that certain disputes are more properly resolved by a means other than judicial settlement, that is, by...the Security Council or the General Assembly... or by some other means...” (240). As such, Judge Oda’s findings are in essence concerned only with practicalities and do not go to the ability of the ICJ to determine the of an act of aggression.

held itself open to a judgment of the Court branding it as the aggressor in the very same case and on the very same facts in respect of which it had so exercised its Security Council veto.

“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. On the contrary, Article 36 of the Statute is cast in comprehensive terms...

“59. Now if one turns to the text of the Charter, of which the Court’s Statute is an integral part, the picture is not so clear. There is support for the United States contentions, in the Charter’s structure and terms and its travaux préparatoires. But the support is ambivalent, as the contrasting interpretations currently placed by the United States and the Court on the implications of Article 12, paragraph 1, of the Charter illustrate. I am not disposed to conclude that so far-reaching a restriction on the competence of the Court can be held to be implied by such ambiguous indications.

“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.”⁷⁸

On the facts, Judge Schwebel found that Nicaragua had committed ‘acts of aggression’ against El Salvador based on the definition of aggression found in Resolution 3314.⁷⁹

⁷⁸ *Nicaragua (Merits)*, above n74, Dissenting Opinion of Judge Schwebel, 289-290.

⁷⁹ *Ibid*, 344. See also 272, 390.

Thus, His Honour held, without ambiguity, that the ICJ is able to determine the occurrence of an act of aggression. And while his dissent in *Nicaragua* is famously strident, there is nothing in the majority decision that contradicts His Honour's findings on this point.

Judge Schwebel's position was implicitly confirmed by a number of the members of the Court in the *Case Concerning Armed Activities on the Territory of the Congo*.⁸⁰ The Democratic Republic of the Congo's Application requested the Court to, *inter alia*, adjudge and declare that Uganda was "guilty of an act of aggression within the meaning of Article 1 of resolution 3314...and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4 of the United Nations Charter."⁸¹ More specifically, in its Memorial, Reply and final oral submissions, the DRC requested the Court to, *inter alia*, adjudge and declare:

"(1) That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:

- the principles of non-use of force in international relations, including the prohibition of aggression; ..."

By 16 votes to one, the Court found that the principle of the non-use of force had been violated.⁸² At its highest, the majority found that: "The 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 on the use of force expressed in Article 2, paragraph 4, of the Charter."⁸³ The majority, however, stopped short of finding that an act of aggression had

⁸⁰ (*Democratic Republic of the Congo v Uganda*) (*Merits*), at <<http://www.icj-cij.org/icjwww/idocnet/ico/icoframe.htm>> at 12 December 2006 (*DRC v Uganda* (*Merits*)).

⁸¹ *Ibid*, para 23, para 345.

⁸² *Ibid*, para 163.

⁸³ *Ibid*, para 165.

been carried out. Indeed, the majority judgment is completely silent on the issue of aggression. The judgment fails to outline whether or not the definition of aggression had been met. Moreover, it fails to discuss whether the Court's omission was a result of the fact that the majority considered it unnecessary to discern whether aggression, as distinct from a violation of the prohibition against the use of force, had been committed for the purpose of establishing State responsibility, or whether the majority avoided the issue for other reasons, such as because it was trying to maintain consistency with the language employed in earlier decisions in relation to the use of force in order to avoid confusion, or because it did not wish to enter the difficult debate about the definition of aggression when it could restrict its decision to a discussion of the violation of Article 2(4), or possibly, whether it believed that determinations of the existence or occurrence of acts of aggression are relevant only to decisions taken under Article 39, or can only be made by the Security Council.

It would be highly surprising if either of the latter two reasons lay behind the majority's failure to discuss aggression. Given the centrality of the concept of aggression to the Application made by the DRC, had the majority been of the view that the occurrence of an act of aggression is relevant only to Article 39 determinations or that determinations as to the occurrence of acts of aggression can only be made by the Security Council, it would be highly unusual, and arguably contrary to basic principles of natural justice, to dismiss the DRC's Application and Prayer for Relief as being misplaced without so much as a single sentence stating this, let alone explaining why. As such, while the international community is left to ponder the reasons for the omission, it is submitted that it is not possible to draw support from the omission for the Security Council exclusive determination case. Indeed, the Separate Opinions of Judges Elaraby and Simma directly, and the Declaration of Judge Koroma impliedly, contradict any supposition of this nature.

Judge Elaraby opened his Separate Opinion by stating unambiguously: "While I fully concur with the Court's findings that there were grave violations of the principle of the non-use of force in international relations, I believe the Court should have explicitly

upheld the Democratic Republic of the Congo's claim that such unlawful use of force amounted to aggression."⁸⁴

After outlining the DRC's submissions, His Honour expressed the view that he felt it was "incumbent upon the Court to respond to the serious allegation put forward by the...[DRC] that the activities of Uganda also constitute aggression as prohibited under international law."⁸⁵ Even more specifically, after making reference to Article 39 of the Charter, His Honour found that: "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' ...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 principle 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.'⁸⁶

After discussing the definition of aggression, Judge Elaraby found that it was "clear" that the activities by Uganda against the DRC amounted to aggression.⁸⁷

Lest the author be accused of taking comments out of context it is noted that in making these findings it appears that Judge Elaraby was conscious of their potential relevance to the jurisdictional debate taking place with respect to the crime of aggression. In the final

⁸⁴ *DRC v Uganda (Merits)*, above n80, Separate Opinion of Judge Elaraby, para 1.

⁸⁵ *Ibid*, para 9.

⁸⁶ *Ibid*, para 11. References omitted.

⁸⁷ *Ibid*, para 14.

paragraph of his Separate Opinion, His Honour commented that: “The International Court of Justice has not been conceived as a penal court, yet its dicta have wide-ranging effects in the international community’s quest to deter potential aggressors and to overcome the culture of impunity. Given the centrality of the claim of aggression to the Democratic Republic of the Congo’s Application as well as the seriousness of the violation of the use of force in the present case and the broader importance of repressing aggression in international relations, I have appended this separate opinion to respond fully to the Democratic Republic of the Congo’s submission on this point.”⁸⁸

Very similar comments were made by Judge Simma. His Honour noted that: “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.”⁸⁹

After discussing the Court’s findings in relation to Uganda’s use of force against the DRC and its characterisation of that force as a “grave violation”, Judge Simma continued: “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.”⁹⁰

His Honour also commented on the different roles of the Security Council and the Court vis-à-vis aggression: “It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region...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 definition 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

⁸⁸ *Ibid*, para 20.

⁸⁹ *DRC v Uganda (Merits)*, above n80, Separate Opinion of Judge Simma, para 2.

⁹⁰ *Ibid*, para 2.

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!”⁹¹

While not as forceful as the opinions of Judges Elaraby and Simma, Judge Koroma also makes some findings relevant to the jurisdictional issue. His Honour discussed Uganda’s submission that the DRC was responsible for the armed attacks of rebel groups in Uganda and therefore guilty of aggression as defined in Article 3(g) of Resolution 3314,⁹² a contention that was rejected by the majority on the basis that there was insufficient evidence to attribute the acts of the rebels to the DRC. In this context, His Honour referred to the distinction made in *Nicaragua* and in the *Oil Platforms Case*⁹³ between cases of ‘armed attack’ and ‘other less grave forms’ of the use of force. His Honour explained: “According to the Court, it is necessary to distinguish between a State’s massive support for armed groups, including *deliberately* allowing them access to its territory, and a State’s enabling groups of this type to act against another State. Only the first hypothesis could be characterized as an ‘armed attack’ within the meaning of Article 51 of the Charter, thus justifying a unilateral response. Although the second would engage the international responsibility of the State concerned, it constitutes no more than a ‘breach of the peace’, enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence. In other words, if a State is powerless to put an end to the armed activities of rebel groups despite the fact that it opposes them, that is not tantamount to use of armed force by that State, but a threat to the peace which calls for action by the Security Council. In my opinion, this interpretation is consistent with Article 51 of the Charter and represents the existing law.”⁹⁴

⁹¹ *Ibid*, para 3.

⁹² *DRC v Uganda (Merits)*, above n80, Declaration of Judge Koroma, para 8.

⁹³ *(Islamic Republic of Iran v United States of America) (Merits)* ICJ Rep [2003] 161.

⁹⁴ *DRC v Uganda (Merits)*, above n80, Declaration of Judge Koroma, para 9.

However controversial Judge Koroma's findings in relation to the scope of Article 51 may be, what is of interest for current purposes is the fact that His Honour took it for granted that the Court had the ability to describe a situation as a breach of the peace or a threat to the peace. Given there is no logical basis for drawing a distinction in this context between threats to, and breaches of, the peace on the one hand and acts of aggression on the other, this assumption supports the contention that the determination of the existence of an act of aggression does not belong exclusively to the Security Council.

The above analysis has demonstrated the ability of both the GA and the ICJ to determine the existence or occurrence of acts of aggression. It might also be noted that State courts are, at least theoretically, able to determine that an act of aggression has occurred for the purpose of prosecuting the crime of aggression at the national level. In its 1996 Draft Code, the ILC proposed that the international criminal court only be allowed to prosecute crimes of aggression (with exceptions made for States trying their own nationals).⁹⁵ Any modification of the complementarity principles under the Rome Statute, however, would require the voluntary divestment of jurisdiction by States. It cannot be suggested that States are contravening the UN Charter if they were currently to proceed with the prosecution of the crime on the basis that a State's court, and not the Council, determined the existence or occurrence of an act of aggression. In this light, it seems contradictory to claim that the ICC is unable to make the requisite determination.

The ability of the question of the occurrence of an act of aggression to be answered on a legal, as well as a political basis, has been addressed in passing above. A few additional points should be made. Firstly, the lack of definition of the terms in Article 39 and the Security Council discretion this allegedly points to will be addressed.

Much has been made by proponents of exclusive Security Council determination of UNCIO's failure to define the terms in Article 39, including 'act of aggression'. Closer

⁹⁵ Draft Article 8 provided that: "...Jurisdiction over the crime set out in article 16 [Crime of Aggression] shall rest with an international criminal court. However, a state referred to in article 16 is not precluded from trying its nationals of the crime set out in that article."

attention, however, must be paid to the reasons for the Conference's decision. The debate over the definition of aggression in San Francisco arose in the special context of the post-war period. Certain States were concerned with ensuring that the Security Council would come to the aid of victims of aggression. Thus, the argument was made that certain situations should be defined as constituting aggression to ensure that action by the Council would be 'automatic'.⁹⁶ The removal of the discretion to intervene was in and of itself controversial. It was especially controversial, as outlined in the Report of Mr Paul-Boncour, because the majority of Committee members were of the view that it would be impossible to list all cases of aggression given the rapid development of techniques of war. The alternative of the Council being given discretion via a non-exhaustive definition was also considered problematic based on the belief that the Council would tend to consider any act not specifically listed as less important and that omissions could advantage an aggressor or delay action by the Council. Conversely, concern was expressed that listed examples of aggression may cause the Council to apply collective sanctions prematurely.⁹⁷ In light of such difficulties, and perhaps in the knowledge that further debate in relation to the issue could have brought the negotiation of the Charter to a standstill, the term aggression was retained, but not defined. The travaux préparatoires thus do not actually support an interpretation of the Charter that would prohibit any organ or entity other than the Security Council determining the existence or occurrence of an act of aggression – simply that the majority of Conference participants were not prepared to lock the Council into taking enforcement action in any given situation.

It should also be pointed out that courts are commonly required to interpret vague or undefined terms.⁹⁸ As *De Wet* notes: "The application of vague legal terms on a particular set of facts is necessarily linked to a certain discretion, but the exercise thereof

⁹⁶ *Erika De Wet*, above n20, 146, note 80.

⁹⁷ *Report of Mr Paul-Boncour*, above n14, 352. See also *Umberto Leanza*, 'The Historical Background' in M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (2004) 3, 4-5.

⁹⁸ *Erika De Wet*, above n20, 136.

neither has to be evidence of an unlimited political discretion of a preclusive nature, nor that no definition for these terms should be attempted at all.”⁹⁹

Indeed, as *De Wet* goes on to note, “there is nothing inherently special about the terms used in Article 39 that would *ab initio* remove them from the ambit of legal interpretation.”¹⁰⁰ *De Wet* in fact makes the compelling suggestion that: “the mere fact that Article 39 distinguishes between three criteria that trigger binding resolutions of the Security Council, implies that it does not have an unbound discretion. If an unbound discretion had been intended, such a distinction would have been obsolete. The Charter would only have contributed to the Security Council the general power to adopt binding measures in the interests of international peace and security and nothing more.”¹⁰¹

Moreover, if the terms used in Article 39 had no normative meaning, and the Security Council had complete discretion to declare the provisions of Chapter VII applicable at any time, the distinctions made in the Charter between Chapters VI and VII (both as to triggering events and the differing powers of the Council in response to such events) would become meaningless.¹⁰² If it is thus accepted that the terms have, or are capable of having, a legal meaning, there seems no reason why an entity other than the Security Council could not determine the existence or occurrence of aggression for purposes other than instituting Chapter VII measures.

The notion of purpose highlights another important issue. It was noted above that the purpose of the Security Council’s power to make determinations as to the existence of acts of aggression is as a precursor to decision-making about recommendations and Chapter VII measures. This, it was suggested, leaves open the possibility of other entities determining the existence or occurrence of acts of aggression for *other* purposes. But it can be argued that the Charter does more than this. It can be argued that the Charter

⁹⁹ *Ibid*, 136.

¹⁰⁰ *Ibid*, 136-137. See also *Tadic Case*, above n23, para 29, where the Appeals Chamber held that “While the ‘act of aggression’ is more amenable to a legal determination, the ‘threat to the peace’ is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.”

¹⁰¹ *Erika De Wet*, above n20, 136-137.

¹⁰² *Ibid*, 137.

militates against the Security Council having the ability, let alone the exclusive ability, to make decisions that have the function of allocating responsibility, particularly as an integral part of a judicial process.

Chapter VI of the Charter relates to the Pacific Settlement of Disputes, defined under Article 33 as disputes “the continuance of which is likely to endanger the maintenance of international peace and security”. Article 36(1) provides the Security Council with the ability to “recommend appropriate procedures or methods of adjustment” in respect of such disputes. Paragraph (3) states that: “In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

Article 37(2) provides that: “If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.”

Finally, Article 38 provides that: “Without prejudice to the provisions of Article 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.”

The provisions in Chapter VI serve as an indication of the fact that the Council was intended to have limited judicial functions. The implication of Article 36(3) is that legal disputes are not the business of the Council.¹⁰³ Articles 37 and 38, moreover, allow the Council to make “recommendations” only – it gives the Council no judicial power in the sense of determining the rights and obligations of the parties to a dispute, even if the continuance of the dispute is likely to endanger the maintenance of international peace and security.

¹⁰³ Derek Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’ (1994) 5 *European Journal of International Law*, 89, 90.

The lack of judicial power possessed by the Council is confirmed in Chapter VII. Article 40 states that the power of the Council to order provisional measures is “without prejudice to the rights, claims, or position of the parties concerned.” The manner in which remaining Chapter VII powers are described implies that they are limited to short-term measures for peace enforcement. Thus, the implication is that it is not the role of the Council to determine finally the rights and obligations of Member States.¹⁰⁴

According to *Frowein* and *Krisch*, the above-outlined interpretation is confirmed by the *travaux préparatoires*, for at UNCIO the US and the UK made a declaration to the effect that the Council could recommend terms of settlement under Article 37, but could not invoke Chapter VII to decide on them with obligatory effect.¹⁰⁵

The interpretation is further confirmed by the centrality accorded to the principle of sovereign equality, enshrined in Article 2(1) of the Charter.¹⁰⁶ As Stein notes, because of their veto, the P5 have an effective immunity from enforcement action by the Security Council.¹⁰⁷ They do not enjoy the same immunity before the GA or ICJ. A key component of the jurisdictional debate is whether leaders of the P5 should be given an additional effective immunity from a new international institution.¹⁰⁸ Noting that the term sovereign equality is interpreted to mean judicial equality, Stein argues that to extend the immunity would be in conflict with Article 2(1).¹⁰⁹

¹⁰⁴ See *Jochen Frowein & Nico Krisch*, above n23, 742.

¹⁰⁵ *Jochen Frowein & Nico Krisch*, ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’ in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) 701, 705-706 citing UNCIO XII, 162, Doc 1027 III/2/31(1).

¹⁰⁶ “The Organization is based on the principle of the sovereign equality of all its Members.”

¹⁰⁷ It should be noted that all members of the Council are able to vote on Chapter VII decisions, even if involved in the situation under consideration. There is no requirement of recusal. See *Babback Sabahi*, ‘The ICJ’s Authority to Invalidate the Security Council’s Decisions under Chapter VII: Legal Romanticism or the Rule of Law?’ (2004) 17 *New York International Law Review* 1, 7-8.

¹⁰⁸ *Mark S. Stein*, above n30, 6.

¹⁰⁹ Stein cites the report of the UNCIO committee responsible for drafting what would become Article 2(1), which states that: “The subcommittee voted to keep the terminology ‘sovereign equality’ on the assumption and understanding that it conveys...that states are juridically equal...” *Report of Rapporteur of Subcommittee 1/1/A to Committee 1/1*, Conference on International Organization, Selected Documents (1946) 483 cited in *ibid*, 7, note 25. See also *Vera Gowlland-Debbas*, ‘The Relationship between Political and Judicial Organs of International Organisations: The Role of the Security Council in the New International Criminal Court’ in L. Boisson de Cahzournes, C. Romano & R. MacKenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002), 205.

The astute reader will of course note that in recent times the Council has ignored these limits and has acted on a quasi-judicial basis on occasion: after the second Gulf War the Council established subsidiary organs for the final demarcation of the Iraq-Kuwait border, as well as for the calculation of reparations due to Kuwait; during the conflict in the former Yugoslavia, the Council ordered the Bosnian Serbs to accept a specific plan for a territorial settlement and imposed sanctions when they failed to do so, and in addition enforced the final peace agreement through Chapter VII measures; the Council demanded the extradition of terrorist suspects and the payment of reparations by Libya after the Lockerbie bombing; and the Council determined that Israel violated article 49 of the Fourth Geneva Convention after Israel deported to Lebanon Palestinian civilians from the occupied territories. Most of these measures, however, met with criticism, therefore casting doubt on any argument that subsequent practice has altered the original Charter interpretation, despite their ultimate acceptance by a majority of States.¹¹⁰

The other measure taken by the Council often cited as being quasi-judicial is the establishment of the ICTY and ICTR. The *Tadic Case* is, however, instructive in this regard. The Appeals Chamber held that: “Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.”¹¹¹

Importantly, the Appeals Chamber continued, making it clear that the establishment of the ICTY was not itself an exercise of judicial power: “The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal

¹¹⁰ Jochen Frowein & Nico Krisch, above n105, 706.

¹¹¹ *Tadic Case*, above n23, para 37.

function of [the] maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.”¹¹²

The Tribunal drew an important parallel in this regard: “The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East (“UNEF”) in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objections, declared: ‘[T]he Charter does not confer judicial functions on the General Assembly [...] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations.’ (*Effect of Awards*, at 61).”¹¹³

Thus, if the Tribunal’s findings are accepted, it can be concluded that the Council has never uncontroversially exercised judicial functions. This, taken with the general tenor of the Charter which, as outlined above, segregates legal matters to the purview of the ICJ (the only judicial institution in existence at the time of the adoption of the Charter) and provides that the Council’s powers in relation to the settlement of the rights and obligations of parties are only provisional or non-binding, indicates that it would in fact be inappropriate for the Security Council to make determinations that are judicially binding.

A handful of additional comments should be made to address the arguments made by proponents of Security Council determination that were outlined above. One argument raised relied on the obiter comments made in the *Genocide* and *Lockerbie* cases, which indicated the Council is the final arbiter in relation to determinations made under Article 39.¹¹⁴ The first thing that should be noted is that the comments cited lie at the heart of separate and dissenting opinions. This status is important in this instance, as the majority of the members of the Court at least left open the possibility of incidental judicial review

¹¹² *Ibid*, para 38.

¹¹³ *Ibid*.

¹¹⁴ See notes 17 to 18 and accompanying text.

of Security Council decisions (even those made under Chapter VII) in the course of determining the legal rights between the parties to a dispute. Context is also imperative. The exclusive discretion being discussed in the quoted excerpts (including *Kanyabashi*) relate to the discretion to determine the existence of an Article 39 event for the purpose of taking enforcement action under Chapter VII. This article has already argued that determination of the existence or occurrence of an act of aggression for *other purposes* is a distinct issue - and one that was not addressed by the judges quoted.

The role of Article 103 must also be addressed. It is hoped that the above analysis has demonstrated that there is no requirement under the Charter that the Security Council alone determine the existence or occurrence of acts of aggression for purposes other than the initiation of Chapter VII measures. In assessing the existence or occurrence of an act of aggression the ICC moreover would not be making a determination in order to institute measures of collective security, merely to determine one element of the crime of aggression. Thus, the type of conflict envisaged in Article 103 does not arise,¹¹⁵ as any obligations that fall on Members of the UN by virtue of contradictory determinations by the Security Council and the ICC would not directly conflict.

Finally, it might be noted that the foregoing analysis has been premised on an assumption that the question before the Security Council would relate to the existence or occurrence of an act of aggression because this is likely to form at least the crux of the State act element of the crime of aggression. The Special Working Group on the Crime of Aggression (SWGCA), however, are currently considering alternatives to this formulation, principally 'an armed attack'.¹¹⁶ Should the State act element of the crime be defined exclusively by reference to an armed attack, it is submitted that the Security Council determination case would fall apart entirely. The argument rests on the reference in Article 39 to 'an act of aggression'. It is difficult to see how the exclusive determination argument could be sustained in relation to 'an armed attack', particularly

¹¹⁵ Constantine Antonopoulos, 'Whatever Happened to Crimes against Peace' (2001) 6 *Journal of Conflict and Security Law*, 33, 52.

¹¹⁶ 2007 Chairman's Discussion Paper, above n2, 3.

as Member States are given the implicit right to determine the occurrence of such an event in the context of the right to self-defence under Article 51 of the Charter.

1.3 Conclusion

Thus far, this article has addressed the issue of whether there is any support in law for the argument that the UN Security Council has the exclusive ability to determine the existence or occurrence of an act of aggression. As Article 5(2) of the Rome Statute is inconclusive, any legal restriction on the ability of other entities to make such a determination would have to be found in the UN Charter. An analysis of the Charter finds no such restriction. Moreover, certain provisions of the UN Charter point to a conclusion that it would in fact be inappropriate for the Council to make binding determinations for the purpose of international criminal law. It is thus submitted that granting the ICC the jurisdiction to determine independently the existence or occurrence of an act of aggression for the purpose of assessing the State act element of the crime of aggression would not contravene the Charter.

2. Do policy considerations support security council determination?

2.1 Policy arguments in support of Security Council determination:

Establishing that there is no legal basis for exclusive Security Council determination of the existence or occurrence of an act of aggression does not provide a complete answer to the jurisdictional debate. This is because, although it has rarely been openly acknowledged, at the end of the day, the debate's outcome seems far more likely to be dictated by the realities of international politics rather than international law. That this is so is a result of the simple fact that the crime of aggression is perceived as lying perilously close to security interests.

Thus the most powerful argument put forward in favour of exclusive Security Council determination is one based not on law but on *realpolitik*. The reality appears to be that

the P5 and their allies regard Security Council determination as the “*conditio sine qua non* for the inclusion of the crime of aggression.”¹¹⁷

David Scheffer, has stated that: “Aggression is the one crime that other nations may seek to charge our globally deployed military with, regardless of the merits. It is a crime that invites political manipulation to serve the interests of whoever regards any projection of military power to be aggressive. It goes to the heart of why we intervene.”¹¹⁸

The P5, and certainly the US, do have a strong history of unilateral, regional and coalition based military interventions; interventions that the P5 (and many others) would describe as ‘peace-keeping’ or ‘peace-enforcement’ efforts, or as constituting ‘humanitarian interventions’, and on the right side of the law, even when not specifically mandated by the Security Council. Thus there may be a legitimate concern that rogue States that have opposed such military activities could attempt to initiate political prosecutions, or prosecutions that may attempt to take advantage of the grey areas surrounding the prohibition against the use of force.

Three other interpretations of the P5’s resolve to ensure that the Security Council determines the existence or occurrence of acts of aggression readily arise. The first is that the P5 wish to have the ability to shield their leaders and the leaders of their allies from prosecution for the crime of aggression –regardless of the merits of such prosecution. The second is that the P5 wish to enhance or protect their privileged status within the international community in the context of increasing debate about the need for Security Council reform. The third is that the P5 do not wish the ICC to ever have jurisdiction over the crime and their stance is premised on a belief that jurisdiction could be a sticking point, ultimately leading to a breakdown in negotiations.

Whether the P5 position is viewed as being legitimate or simply self-serving it is the implications of the P5 stance for the jurisdictional debate that are important. The power

¹¹⁷ *Hermann A. M. Von Hebel & Darryl Robinson*, ‘Crimes within the Jurisdiction of the Court’ in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 84.

¹¹⁸ Cited in *Daniel D. Ntanda Nsereko*, ‘Bringing Aggressors to Justice: From Nuremberg to Rome’ (2005) 2 *University of Botswana Law Journal* 5, 26.

politics involved may mean that the ICC will never have an active jurisdiction over the crime of aggression unless the crime features Security Council determination of the State act element of the crime, or at least provides for a deferment to the Council in some way. Given the equal steadfastness of the opponents of Security Council determination, it is possible that a refusal to compromise on the issue of jurisdiction by either side will result in a breakdown of negotiations. Alternatively, a definition of the crime could be adopted that provides for ICC determination of the State act element of the crime, or for a compromise proposal, but which does not have the backing of the P5 or their closest allies.

The adoption of provisions lacking the support of the P5 and their allies could be as unfortunate as a complete failure to activate the ICC's jurisdiction over the crime of aggression. Without the support of the P5, the ICC's attempts to prosecute crimes of aggression may be effectively stymied. In relation to the crime of aggression more than any other crime (because of the leadership element), the Court is likely to rely on Security Council assistance with respect to evidence gathering and the arrest and surrender of accused persons. Security Council action in relation to an allegedly aggressive act is, moreover, likely to serve as important evidence in terms of the legality of the State act element of the crime – a cooperative rather than hostile relationship may ensure that resolutions vis-à-vis allegedly aggressive acts are drafted by the Council with future prosecutions in mind. More broadly, a lack of support from key international players for one of the four main crimes under the Court's jurisdiction may undermine the Court as a whole.

A number of additional policy arguments have been advanced in favour of Security Council determination. These arguments (of varying merit) can be summarised briefly:

- the ability of the ICC to determine the existence or occurrence of aggression could undermine the Security Council, given that it leaves open the potential for the ICC to determine that an act of aggression has occurred in a situation where the Council has

failed to make an Article 39 determination or take enforcement measures under Chapter VII;¹¹⁹

- a Court determination that a leader of a State engaged in an ongoing armed conflict was guilty of aggression could have the effect of ‘hardening the resolve’ of the State to ‘fight to the finish’ rather than negotiate a peace deal;¹²⁰
- were the ICC able to determine the existence of an act of aggression the Security Council may lose its ability to negotiate the peaceful settlement of armed conflicts by offering amnesty to perpetrators;¹²¹
- determinations as to the existence or occurrence of acts of aggression would immerse the ICC in political controversies between States, which could endanger the ICC’s judicial role and image;¹²²
- the ICC is not equipped to consider matters that may lie at the heart of allegations of aggression such as maritime boundaries, the scope of legitimate self-defence under Article 51, and the status of self-help remedies under international law;¹²³ and
- the ICC has jurisdiction over natural persons only, not States (Articles 12 and 25(1) of the Rome Statute). Decisions as to the occurrence of an act of aggression would have implications for the rights of States.¹²⁴

¹¹⁹ *Report of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, 13 to 15 June 2005, Princeton University, New Jersey, UN Doc. ICC-ASP/4/SWGCA/INF.1 (2005), 61; *Jackson Nyamuya Maogoto*, ‘Aggression Supreme: International Offence Still in Search of a Definition’ (2002) 6 *Southern Cross University Law Review*, 278, 307; *Jennifer Trahan*, above n25, 464; *Matthias Schuster*, above n6, 15-16; *William A. Schabas*, ‘United States Hostility to the International Criminal Court: It’s All About the Security Council’ (2004) 14 *European Journal of International Law*, 701, 715.

¹²⁰ *Lyal S. Sunga*, *The Emerging System of International Criminal Law, Developments in Codification and Implementation* (1997), 51 cited in *Major Michael L. Smidt*, ‘The International Criminal Court: An Effective Means of Deterrence?’ (2001) 167 *Military Law Review* 156, 205.

¹²¹ *Allegra Carroll Carpenter*, ‘The International Criminal Court and the Crime of Aggression’ (1995) 64 *Nordic Journal of International Law*, 223, 233; *Matthias Schuster*, above n6, 15.

¹²² *Theodor Meron*, above n6, 13.

¹²³ *Ibid.*

The following section will address each of the policy arguments put forward in favour of Security Council determination and will raise additional arguments that support ICC determination.

2.2 Policy arguments against Security Council determination:

2.2.1 The Council's reluctance to characterise uses of force as aggression: selective justice at best, a hamstrung Court at worst

Where proponents of Security Council determination assert that international politics dictate a role for the Council, opponents argue that politics is the very reason the Security Council should play no special role in relation to the crime of aggression.

It is widely acknowledged that the Council has a selective agenda, "heavily influenced by geopolitical and regional realities and preferences" and a "differentiated means of addressing those crises it does take on."¹²⁵ There is little reason to believe that even-handedness would suddenly characterise the Council's agenda and treatment of situations were the Council to become responsible for determining the State act element of the crime of aggression. Indeed, the threat of the criminal prosecution of a State's leaders is likely to lessen any chance there is of the scrutiny of the military actions of the P5 and their closest allies.

One does not have to be a critic of the Security Council's practices to comprehend the very real possibility of selective justice. It seems obvious that the Council has legitimate reasons from time to time for refusing to characterise an act as aggressive. Securing peace in the midst of a bloody conflict may simply be seen as more important than achieving criminal justice on occasions where the two goals appear to be, politically,

¹²⁴ *James Nicholas Boeving*, 'Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute' (2004) 3 *Columbia Journal of Transnational Law*, 557, 578; *Theodor Meron*, above n6, 13.

¹²⁵ *David M. Malone*, 'Conclusion' in D. M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 625. See also *Sydney Bailey*, *The Procedure of the UN Security Council* (1998), 245.

mutually incompatible.¹²⁶ A State branded an aggressor may be less willing to negotiate (particularly if the Council's good offices are seen to have been undermined by an apportionment of blame for a breach of Article 2(4)), which may considerably limit the possibility of restoring peace.¹²⁷

The selectivity under discussion is readily demonstrated by a survey of Security Council resolutions. The Council has characterised certain acts of Southern Rhodesia,¹²⁸ South Africa¹²⁹ and Iraq¹³⁰ as "aggressive", and has passed resolutions referring to the "acts of aggression" of South Africa,¹³¹ Southern Rhodesia¹³² and Israel;¹³³ the "aggression" of South Africa¹³⁴ and Israel;¹³⁵ the "armed aggression" of Israel¹³⁶ and of mercenaries

¹²⁶ A. D'Amato, *International Law and Political Reality* (1995) 208 cited in *Justin Hogan-Doran & Bibi T. Van Ginkel*, 'Aggression as a Crime Under International Law and the Prosecution of Individuals by the Proposed International Criminal Court' (1996) 43 *Netherlands International Law Review* 321, 341; *Allegra Carroll Carpenter*, above n121, 237.

¹²⁷ *Constantine Antonopoulos*, above n115, 49-50; *Irina Kaye Muller-Schieke*, 'Defining the Crime of Aggression under the Statute of the International Criminal Court' (2001) 14 *Leiden Journal of International Law*, 409, 421-422; *Andreas L. Paulus*, above n6, 17.

¹²⁸ SC Res **326**, UN SCOR, 1691st mtg, UN Doc S/Res/326 (1973); SC Res **386**, UN SCOR, 1892nd mtg, UN Doc S/Res/386 (1976).

¹²⁹ SC Res **387**, UN SCOR, 1906th mtg, UN Doc A/Res/387 (1976); SC Res **428**, UN SCOR, 2078th mtg, UN Doc S/Res/428 (1978); SC Res **527**, UN SCOR, 2407th mtg, UN Doc S/Res/527 (1982); SC Res **535**, UN SCOR, 2455th mtg, UN Doc S/Res/535 (1983).

¹³⁰ SC Res **667**, UN SCOR, 2940th mtg, UN Doc S/Res/667 (1990).

¹³¹ SC Res **387**, above n127; SC Res **418**, UN SCOR, 2046th mtg, UN Doc S/Res/418 (1977) (this resolution refers only to persistent acts of aggression, rather than a specific act of aggression); SC Res **447**, UN SCOR, 2139th mtg, UN Doc S/Res/447 (1978); SC Res **454**, UN SCOR, 2170th mtg, UN Doc S/Res/454 (1979); SC Res **466**, UN SCOR, 2211st mtg, UN Doc S/Res/466 (1980) (this resolution only recalls past acts of aggression); SC Res **475**, UN SCOR, 2240th mtg, UN Doc S/Res/475 (1980); SC Res **546**, UN SCOR, 2511st mtg, UN Doc S/Res/546 (1984); SC Res **567**, UN SCOR, 2597th mtg, UN Doc S/Res/567 (1985); SC Res **568**, UN SCOR, 2599th mtg, UN Doc S/Res/568 (1985); SC Res **571**, UN SCOR, 2607th mtg, UN Doc S/Res.571 (1985); SC Res **572**, UN SCOR, 2609th mtg, UN Doc S/Res/572 (1985); SC Res **574**, UN SCOR, 2617th mtg, UN Doc S/Res/574 (1985); SC Res **577**, UN SCOR, 2631st mtg, UN Doc S/Res/577 (1985); SC Res **580**, UN SCOR, 2639th mtg, UN Doc S/Res/580 (1985); SC Res **581**, UN SCOR, 2662nd mtg, UN Doc S/Res/581 (1986); SC Res **602**, UN SCOR, 2767th mtg, UN Doc S/Res/602 (1987).

¹³² SC Res **411**, UN SCOR, 2019th mtg, UN Doc S/Res/411 (1977); SC Res **423**, UN SCOR, 2067th mtg, UN Doc S/Res/423 (1978) (this resolution refers only to continuing acts of aggression generally as opposed to a specific act of aggression); SC Res **424**, UN SCOR, 2070th mtg, UN Doc S/Res/424 (1978); SC Res **445**, UN SCOR, 2122nd mtg, UN Doc S/Res/445 (1979); SC Res **455**, UN SCOR, 2171st mtg, UN Doc S/Res/455 (1979).

¹³³ SC Res **573**, UN SCOR, 2615th mtg, UN Doc S/Res/573 (1985); SC Res **611**, UN SCOR, 2810th mtg, UN Doc S/Res/611 (1988).

¹³⁴ SC Res **387**, above n129; SC Res **428**, above n129; SC Res **447**, above n131; SC Res **454**, above n131; SC Res **475**, above n131; SC Res **571**, above n131; SC Res **574**, above n131; SC Res **581**, above n131.

¹³⁵ SC Res **573**, above n133; SC Res **611**, above n133.

¹³⁶ SC Res **573**, above n133.

against Benin;¹³⁷ and “mercenary aggression” perpetrated against the Seychelles¹³⁸ - with these terms sometimes being used interchangeably in the same resolution.¹³⁹ It is immediately evident, however, that other uses of armed force that are widely viewed as being as serious, if not more serious, than the examples that the Security Council has characterised as aggression, are missing from this list. This is readily illustrated by the fact that Council resolutions relating to the invasion and occupation of Kuwait by Iraq in 1990 did not employ the term aggression (or any related term), Resolution 660¹⁴⁰ instead determining that there existed a breach of the peace. It was only when Iraq ordered the closure of diplomatic and consular missions in Kuwait and committed acts of violence against diplomatic missions and their personnel that the Council adopted Resolution 667, characterising those specific acts as ‘aggressive’.

Whatever the reasons for its inconsistency, the application of the selective approach that has characterised the Council’s resolutions on collective security to criminal justice would be unpalatable. It would make a mockery of the guarantees provided by the Rome Statute and other human rights instruments of equality before the law.¹⁴¹

A review of Security Council resolutions relating to aggression raises another interesting issue. While drafting has yet to be finessed, it is possible that if the Security Council determination model is adopted by the Assembly of States Parties (ASP), the jurisdictional provisions inserted into the Rome Statute may require the adoption by the Council of a resolution under Chapter VII of the Charter – this would be consistent with Articles 13(b) and 16 of the Statute. In this context, it is important to note that it is

¹³⁷ SC Res **405**, UN SCOR, 2005th mtg, UN Doc S/Res/405 (1977).

¹³⁸ SC Res **496**, UN SCOR, 2314th mtg, UN Doc S/Res/496 (1981); SC Res **507**, UN SCOR, 2370th mtg, UN Doc S/Res/507 (1982).

¹³⁹ See Resolutions 387, 428, 447, 454, 475, 571, 573, 574, 581 and 611. In addition the Council alluded to aggression in SC Res **294**, UN SCOR, 1572nd mtg, UN Doc. S/Res/294 (1971) in relation to Portuguese violence against Senegal, when it said “Conscious of its duty to take effective collective measures for the prevention and removal of threats to international peace and security and for the suppression of acts of aggression.”

¹⁴⁰ SC Res 660, UN SCOR, 2932nd mtg, UN Doc S/Res/660 (1990).

¹⁴¹ See *International Covenant for Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, Art 14(1) (entered into force 23 March 1976) (ICCPR), *Universal Declaration of Human Rights*, adopted and proclaimed by *Resolution on an International Bill of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (1948), Article 10 (UDHR) and Article 67(1) of the Rome Statute.

unclear whether any of the resolutions cited constituted determinations under Article 39. It is established practice that the Council need not expressly refer to Article 39 in its decisions in order to determine properly that one of the triumvirate exists as a prelude to taking enforcement action.¹⁴² It has in fact become standard practice for the Council to state merely that it is acting under Chapter VII of the Charter when taking mandatory measures.¹⁴³ Yet only Resolutions 418 and 667 of the resolutions cited state that the Council is acting under Chapter VII. And while Resolution 418 refers to South Africa's "persistent acts of aggression", it also states that the Council: "*Determines*, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related matériel constitutes a threat to the maintenance of international peace and security." Indeed, of the 32 different resolutions referred to above, 15 state that the situation in question constituted a (serious) threat to international peace and security¹⁴⁴ or endangered international peace and security.¹⁴⁵ While not necessarily identical to a determination that there exists a threat to the peace (as required by Article 39) the references make it difficult to conclude that the Security Council, in employing the terms aggression and/or aggressive, was actually making Article 39 determinations that acts of aggression existed.¹⁴⁶ The only Resolution that seems possibly to qualify as a determination is Resolution 667, which, in addition to referring to Chapter VII, states that: "*Considering also* that these actions by Iraq constitute aggressive acts and a flagrant violation of its international obligations which strike at the root of the conduct of international relations in accordance with the Charter of the United Nations."

Given the number of serious breaches of the prohibition against the use of force that have taken place since the adoption of the UN Charter, the fact that it appears the Council has made only one formal determination that an act of aggression existed is a worrying precedent. If a Chapter VII resolution was required, and the Council's reticence to

¹⁴² Jochen Frowein & Nico Krisch, 'Article 39' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., 2002) 717, 727.

¹⁴³ *Ibid.*

¹⁴⁴ Or refer to such a statement having been made in an earlier resolution.

¹⁴⁵ See Resolutions 326, 411, 418, 423, 424, 445, 447, 455, 475, 546, 567, 573, 574, 577, 602.

¹⁴⁶ A majority of authors in fact claim that the Council has never made a determination under Article 39 as to the existence of an act of aggression. See for example *Matthias Schuster*, above n6, 16; *Vera Gowlland-Debbas*, above n109, 210; *Erika De Wet*, above n20, 148-149; *Constantine Antonopoulos*, above n115, 48.

characterise acts as aggression was to endure, it would mean that any breakthrough with regards to the crime of aggression would be illusory only. Reliance on Council determinations under Article 39 may effectively mean that the Court is never, or almost never, able to exercise jurisdiction over the crime.

Of course, instead of requiring a Chapter VII resolution, the Rome Statute could require only a resolution employing the terms 'aggression' or 'aggressive' to describe the conduct of a State in order to activate the jurisdiction of the Court. Stepping away from Article 39, however, undermines the argument for exclusive determination in the first place.

2.2.2 The unenforceable definition of 'an act of aggression': the violation of the right to a fair trial

Many States have made it clear during the SWGCA's negotiations that their position on the jurisdictional issue is dependant on the type of definition of 'an act of aggression' that is adopted - and vice versa. There is another intersection between the definitional and jurisdictional issues, however, that has been largely overlooked. Namely, what role would be played by any definition of 'an act of aggression' that is adopted under the Rome Statute should the Security Council be granted the ability to determine the existence of this element of the crime?

It is stating the obvious to declare that the Security Council's powers cannot be restricted by the Rome Statute. On the basis of first principles, no international treaty could bind an organ of an international organisation not party to that treaty. This article submits that the implication of this basic fact is that any discretion enjoyed or granted to the Council to determine the existence or occurrence of an act of aggression for the purposes of ICC prosecution could not be curtailed by the adoption, under the Rome Statute, of any definition of a State act of aggression as part of the definition of the crime of aggression. Put another way, even if a detailed definition of 'an act of aggression' is adopted by the ASP, the Court or an accused would have almost no ability to ensure that the definition

had been properly applied by the Council in the event that determination is left in the Council's hands.

Mark Stein has suggested that: "there would be great pressure on the Security Council to apply the definition in the ICC Statute, once that definition is finally thrashed out. Those members of the Security Council who are parties to the ICC Statute could certainly be expected to support using the ICC definition."¹⁴⁷ Leaving aside the issue of the unlikelihood of the members of the Security Council agreeing to the application of an impartial definition to their own conduct (a factor acknowledged by Stein), it should be noted that only two members of the P5 are currently party to the Rome Statute (the UK and France).¹⁴⁸ Thus, even on the basis of Stein's own thesis, three veto-wielding States would have little incentive to apply the Rome Statute's definition of 'an act of aggression'. Indeed, no member of the Council may be prepared to apply a Statute definition of aggression to another States' conduct where the possibility exists that the same Council member may engage in similar conduct in the future, for fear of setting a precedent. Similarly, we might expect hesitation if a declaration that particular conduct falls within a Statute definition of 'an act of aggression' could be interpreted as the Security Council taking a position in relation to controversial aspects of the scope of the prohibition of the use of force (such as the limits of self-defence and the legality of humanitarian intervention), given that ambiguities surrounding the prohibition are clearly used to the advantage of States from time to time. Perhaps more legitimately, a delicate political or security situation might also militate against the impartial application of a Statute definition, lest it extinguish the opportunity to negotiate with a rogue State.

Potentially, there is room to argue that, should any definition under the Rome Statute be replicated under customary international law, the Council would be bound to apply it in making determinations for the specific purpose of activating the ICC's jurisdiction. Such an argument rests on Articles 24(2) and 1(1) of the UN Charter. Article 24(2) provides

¹⁴⁷ *Mark S. Stein*, above n30, 12.

¹⁴⁸ The UK and France are obliged by the customary international law principle *pacta sunt servanda* to perform their obligations under the Rome Statute in good faith. In addition, the UK is a party to the *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 26 of which enshrines the principle.

that in discharging its duties in relation to the maintenance of international peace and security, “the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” Article 1(1) provides that one purpose of the United Nations is: “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”¹⁴⁹

At the time the UN Charter was drafted, it was not anticipated that the types of enforcement action taken under Chapter VII by the Council would include quasi-judicial measures, including those aimed at settling international disputes. These powers were instead dealt with under Chapter VI of the Charter. Thus, originally, the Charter was interpreted as providing that enforcement action taken under Chapter VII was unfettered by the requirement that the Council comply with ‘principles of justice and international law.’ Clearly, however, the Council has interpreted its powers under Articles 39 and 41 of the Charter in an increasingly broad manner, such that it has passed a series of resolutions that purport to determine, or establish the means for determining, legal disputes between States. Thus the argument is made that in adopting resolutions that have the purpose of permanently settling international disputes or situations the Council is required to abide by principles of justice and international law on the basis of Articles 24(2) and 1(1).¹⁵⁰

Should the ASP decide that the Security Council has the exclusive ability to determine the occurrence of an act of aggression, the ICC could potentially be granted the ability to rely on resolutions of the Council that determine the occurrence of an act of aggression made in the course of the Council’s exercise of responsibilities in relation to the

¹⁴⁹ Emphasis added.

¹⁵⁰ *Rudiger Wolfrum*, ‘Article 1’ in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., 2002) 39, 43. See also *G. H. Oosthuizen*, ‘Playing the Devil’s Advocate: the United Nations Security Council is Unbound by Law’ (1999) 12 *Leiden Journal of International Law*, 549, 552-553; *Dapo Akande*, above n11, 317-321.

maintenance of international peace and security, without any reference to the jurisdiction of the International Criminal Court.¹⁵¹ Arguably, in reaching the conclusion that an act of aggression has occurred in such a resolution, the Council could not be required to conform to the principles of justice and international law, because the Council would not have exercised its powers in a way that purported to finally settle an international dispute or situation.¹⁵²

Alternatively, the Court may only be granted jurisdiction over the crime of aggression after the Council adopts a resolution determining the occurrence of an act of aggression for the specific purpose of activating the ICC's jurisdiction. In adopting such a resolution the Council could be said to be exercising its powers in a way that could be characterised as judicial. On the basis of the above argument this could be said to activate the requirement that the Council conform to the principles of justice and international law. The implication for current purposes is that this would arguably require the Council to apply any customary international law definition of the State act element of the crime of aggression.

The pursuit of such argument, however, is little more than an interesting academic exercise. Even if the argument were accepted, the establishment of the uncontroversial existence of customary international law can be exceedingly difficult. And even if a customary definition was widely accepted, the Security Council could not be required to give reasons for its decisions. Together with the fact that a large proportion of Council discussions take place in informal or closed sessions, this would make it virtually impossible to determine whether or not any customary definition had been properly applied. At any rate, it would seem unwise to adopt provisions in the Rome Statute on the basis that a definition of 'an act of aggression' could possibly come to be replicated in customary international law and therefore place the Security Council under some type of obligation to apply it.

¹⁵¹ See for example, paragraph 4 of 2007 Chairman's Discussion Paper, above n2, 4.

¹⁵² It should be noted that some authors contend that the Council must act in conformity with the principles of justice and international law in all circumstances. See for example *Keith Harper*, above n12, 149; *P. Hulsroj*, 'The Legal Function of the Security Council' (2002) 1, *Chinese Journal of International Law* 59, 62-63.

The Court may thus request that the Council apply any definition of ‘an act of aggression’ that is adopted under the Rome Statute, but, even if on occasion such definition was properly applied, there could be no *guarantee* that such definition would be routinely or judiciously applied. What would be the effect of such failure?

Under Article 19(1) of the Rome Statute, the Court must satisfy itself that it has jurisdiction in any case brought before it. It is submitted that Article 19 would have to be interpreted as giving the Court¹⁵³ the power to review Security Council resolutions identifying State acts of aggression for the purpose of determining whether the Court has jurisdiction.¹⁵⁴ This power of the Court, often referred to as *kompetenz-kompetenz jurisdiction*, is, however, limited. The Court would not be empowered under Article 19 to review a resolution for the purpose of determining whether or not the Council had properly applied the Statute’s definition: it would not allow the Court to question the Council’s identification of relevant facts, nor to question whether such facts met the Statute’s definition of aggression. The Court would only have the power to determine whether or not due process had been followed: namely whether or not the Council had in fact adopted a resolution identifying ‘an act of aggression’. Even if the Rome Statute required the Council to have adopted a resolution determining that an act of aggression *as defined in the Rome Statute* had occurred, before the Court could proceed, all that the Court would be able to do under Article 19 is ensure that reference was made to the Statute definition having been met – not in any way substantively review the Council’s decision.

¹⁵³ More accurately, the Pre-Trial Chamber if the issue of jurisdiction is raised before the confirmation of charges, or the Trial Chamber once such charges have been confirmed. Questions of jurisdiction can be appealed to the Appeal Chamber: Article 19(6), Rome Statute.

¹⁵⁴ *Tadic Case*, above n23, 18. For a parallel argument in relation to ICC review of the legality of Security Council resolutions deferring investigation or prosecution under Article 16 or the exercise of jurisdiction under Article 13(b) see *Luigi Condorelli & Santiago Villalpando*, ‘Referral and Deferral by the Security Council’ in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 627, 637, 641, 648, 650. Cf *Dan Sarooshi*, ‘The Peace and Justice Paradox: The International Criminal Court and the UN Security Council’ in D. McGoldrick, P. Rowe & E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 115.

An alternative route of review may arise in circumstances where an accused could rely on Article 22(1) of the Rome Statute. Article 22(1) enshrines the principle of *nullum crimen sine lege*: “a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”¹⁵⁵ The Statute further provides that the definitions of crimes shall be strictly construed, shall not be extended by analogy and that any ambiguities in the definition shall be interpreted in favour of an accused.¹⁵⁶

It is possible that, in a case where the Security Council clearly departed from the text of any definition of an act of aggression that was adopted in declaring particular conduct to constitute an act of aggression, an accused could successfully argue that his or her conduct did not constitute a crime under the Statute at the time it took place, because on any reasonable interpretation of the definition, such definition did not extend to cover the conduct in question.

Were such an argument raised before the Court, it is at least arguable that the Court would be able to determine whether or not the conduct of the accused fell within the definition of ‘an act of aggression’ provided by the Statute. Article 22(1) would not, however, allow the Court to question the Council’s identification of relevant facts. And it would seemingly be unable to consider issues such as whether or not the State in question’s acts constituted a valid exercise of self-defence, unless self-defence was itself defined as part of the crime. Thus, even if Article 22(1) provides an additional potential avenue of review, the review it provides for would be limited.

As such, it can be concluded that even if the Rome Statute carefully defines ‘an act of aggression’, if the Security Council is granted the jurisdiction to determine the existence or occurrence of an act of aggression, the Council would have considerable discretion in the application of this definition. It is submitted that this is inconsistent with an accused’s right to a fair hearing, protected by Article 67(1) of the Statute, and Articles 14(1) of the ICCPR and Article 10 of the UDHR.

¹⁵⁵ See also Article 15 of the ICCPR and Article 11(2) of the UDHR.
¹⁵⁶ Article 22(2).

2.2.3 The violation of additional rights of an accused

The likely violation of the right to equality before the law and the right to a fair trial are not the only rights of an accused threatened by Security Council determination. As alluded to in the excerpts from *Nicaragua* and the *Case concerning Armed Activities on the Territory of the Congo*, Security Council decisions may involve considerations of international law, but are generally influenced to a greater extent by politics, economics and security issues, not to mention, on occasion, public opinion. It should additionally be noted that, in making an Article 39 determination, members of the Council that are parties to the dispute are not excluded from voting.¹⁵⁷ These factors combine to mean that an accused's right to an impartial hearing¹⁵⁸ would likely be violated by Security Council determination.

In the determination of any charge, the Rome Statute in addition relevantly guarantees an accused: (i) a public hearing,¹⁵⁹ (ii) the right to be present at their trial;¹⁶⁰ (iii) the right to conduct their defence in person or through legal assistance of the accused's choosing;¹⁶¹ (iv) the right to call witnesses on their behalf and examine witnesses against them;¹⁶² (v) the right to raise defences and present admissible evidence;¹⁶³ and (vi) the presumption of innocence until proven guilty.¹⁶⁴ It is difficult to see how any of these rights could be said to have been upheld in full in the event that the Security Council is granted the jurisdiction to determine the existence or occurrence of acts of aggression. The accused would lose the right to contest a crucial element of the crime with which he or she was charged. And in relation to the determination of that element of the crime there would be no public hearing given Council determinations are often behind closed doors, no right to be present at Security Council deliberations, no right to advance, let alone conduct, a defence as to the characterisation of the State act as aggression, and no right to call or

¹⁵⁷ Article 27, United Nations Charter. *Hans Kelsen*, above n22, 442.

¹⁵⁸ Article 67(1) of the Rome Statute

¹⁵⁹ Article 67(1). See also Article 14(1) ICCPR and Article 10 UDHR.

¹⁶⁰ Article 67(1)(d). See also Article 14(3)(d) ICCPR.

¹⁶¹ Article 67(1)(d). See also Article 14(3)(d) ICCPR.

¹⁶² Article 67(1)(e).

¹⁶³ Article 67(1)(e).

¹⁶⁴ Article 66. See also Article 14(2) ICCPR and Article 11(1) UDHR.

examine witnesses or present evidence. Moreover, as *Gaja* has noted, a finding of aggression “necessarily implies that at least some of the leaders of the aggressor State are criminally responsible.”¹⁶⁵ This raises questions as to the ability of the Court to uphold the presumption of innocence in all cases. Accordingly it is clear that binding Security Council determinations would have a seriously adverse affect on the rights of an accused and would thus undermine the independent and impartial standing of the ICC.

2.2.4 The means for ensuring legitimate Council expectations and concerns are met already exist

An additional policy reason raised for excluding any special role for the Council in relation to the crime of aggression relates to the roles already afforded to the Council under the Rome Statute. Under Article 13(b), the Security Council, acting under Chapter VII, can refer situations in which one or more crimes appear to have been committed to the Prosecutor.¹⁶⁶ Thus, the Council has the existing ability to ensure that all situations potentially involving the crime of aggression are properly investigated and prosecuted if warranted. In this context, it should be noted that during the Rome Conference, participants were concerned that the Council (like States) have the ability to refer only a ‘situation’, not individual crimes, to the Court. The rationale behind this was the need for a proper separation to be maintained between the Council’s political role and the Court’s judicial one.¹⁶⁷ The same rationale can be applied to the crime of aggression.

The Council also has the existing ability to defer investigations and prosecutions for a renewable period of 12 months on the adoption of a resolution under Chapter VII of the Charter pursuant to Article 16 of the Statute. The Statute thus already provides for criminal prosecutions to be put to one side if they would frustrate the Council’s efforts to maintain or restore international peace and security. As a result, fears as to the loss of the

¹⁶⁵ *Giorgio Gaja*, ‘The Long Journey towards Repressing Aggression’ in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 427, 434.

¹⁶⁶ The Security Council cannot require a prosecution by virtue of Article 13(b). Under Article 53, the Prosecutor must determine whether there is a sufficient basis for a prosecution. If the Prosecutor decides not to proceed, the Security Council must be informed (Article 53(2)) and can request a review of that decision by a Pre-Trial Chamber (Art 53(3)(a)).

¹⁶⁷ *Sir Franklin Berman*, above n4, 174; *Luigi Condorelli & Santiago Villalpando*, above n154, 632.

Council's ability to negotiate peaceful settlements or the hardening of the resolve of States to fight to the finish if the ICC determines the occurrence of acts of aggression are misplaced given that a Security Council resolution could block the investigation or prosecution of an alleged crime in these circumstances.

2.2.5 Answering additional policy concerns raised by Security Council determinists

Leaving aside for the moment the issue of *realpolitik*, the remaining policy objections to ICC determination can be dealt with expeditiously.

Problems caused by the potential conflict between Security Council and ICC determinations regarding aggression are exaggerated. As has been explained above, it is well understood that the Council often makes decisions on the basis of political expediency. It therefore would not be surprising if the Court on occasion made an opposite finding in relation to aggression on the basis of purely legal criteria.¹⁶⁸ It is submitted that the international community would be able to appreciate the different processes behind each decision such that the Council's role in relation to the maintenance of international peace and security would not be undermined – or at least not undermined any further than it has been on the basis of existing critiques. This point has been clearly accepted by the ICJ. The recognition that the ICJ and the Council can exercise jurisdiction concurrently necessarily implies a possibility for conflict between their determinations.¹⁶⁹

The possibility of conflicting decisions, moreover, already exists. In the course of making findings against a particular accused the Court could find that an international armed conflict existed within which wars crimes, crimes against humanity and genocide were committed. The Council may have been utterly silent in relation to the events out of which these crimes arose. Yet the evidence leading to the Court's findings would have to

¹⁶⁸ *Giorgio Gaja*, above n165, 434.

¹⁶⁹ R. St.J. Macdonald, 'Changing Relations between the International Court of Justice and the Security Council of the United Nations' (1993) 31 *Canadian Yearbook of International Law*, 3, 17.

appear to suggest quite clearly that on the facts the Council would have been warranted in determining that there existed at least a threat to the peace. Given the existing potential for contradictory findings, why single out aggression?

It has been suggested by Security Council determinists that ICC determination would unnecessarily politicise the Court. This ignores the politics surrounding any number of other determinations that will be made by the ICC under its existing jurisdiction. Establishing the requisite intent for genocide, the ‘widespread or systematic attack’ element of crimes against humanity, or the ‘plan or policy’ or ‘large-scale commission’ or ‘international armed conflict’ elements of war crimes, may cause the Court to examine various governmental actions and policies. There is no reason to suggest that such determinations involve lesser ‘political controversies’.

Similarly, it was suggested that the ICC is not equipped to determine the existence of an act of aggression. The expertise that will be possessed by members of the Court to make determinations with respect to the existing crimes within the Court’s jurisdiction should equip the judges of the Court adequately.¹⁷⁰ There will, of course, be no need to determine issues such as correct maritime boundaries, as suggested by Theodor Meron, as the reason for a use of force is an issue wholly removed from the determination as to whether or not the use of force constitutes aggression. Yes, the Court may need to determine issues relating to the grey areas surrounding the prohibition of the use of force, such as the scope of the right to self-defence. In this respect, however, it is submitted that there is no reason to suggest that the Security Council would be better equipped than the judges of the ICC to identify the correct Charter interpretation or relevant customary international law on point.

Finally, it was suggested that the Court’s determinations in relation to individuals would necessarily have implications for the rights of States. It is hard to see how, given the existence of Article 25(4) of the Rome Statute which specifically provides that: “No

¹⁷⁰ Phani Dascalopoulou-Livada, ‘The Crime of Aggression: Making Operative the Jurisdiction of the ICC – Tendencies in the Prepcom’ (2002) 96 *American Society of International Law Proceedings*, 185, 189.

provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” Were the same act of aggression to give rise to a contentious case before the ICJ between the victim and aggressor State, the ICJ would be required to determine the issue of the unlawful use of force anew – and as was demonstrated earlier in this Chapter, it is possible for State responsibility to be determined without any reference to aggression, thus the possibility of conflict between ICC and ICJ determinations may be minimal.

2.3 Conclusion

It is submitted that the foregoing analysis demonstrates not only is there no legal requirement that the Security Council determine the existence or occurrence of acts of aggression, but that even when policy grounds are resorted to, there are powerful arguments for why the determination should be made by the ICC. Thus, it is the position of this article that, ideally, the ICC should itself determine all elements of the crime of aggression with no special role to be played by Security Council.

Proponents of Security Council determination do, however, have one ace up their sleeve: that of *realpolitik*. While it is without doubt that in an ideal world, the imperatives of justice should be acceded priority over demands of self-interest, and there is no guarantee that bending to the demands of the US in particular would bring about a reversal of US policy in relation to the ICC, in the context of the negotiation of a multilateral treaty, *realpolitik* cannot be readily dismissed. The reality is that negotiations are unlikely to proceed, at least not without the support of key powerful States, unless at least a compromise is reached.¹⁷¹ It is for this reason, that this article will next consider compromise proposals.

¹⁷¹ This view is shared by at least one of the leading voices in the SWGCA, Phani Dascalopoulou-Livada: see *ibid*, 189.

3. Compromising

3.1 The problem with existing compromise proposals

A number of compromise proposals have been put on the table since the Rome Conference. Those proposals variously provide that the occurrence of an act of aggression be determined by:

- the ICC - in the event that the Security Council, after notification by the Court, fails to make a determination or does not make use of Article 16 within a specified time period;¹⁷²
- the ICC – in the event the Security Council fails to act and the GA fails to make a determination after such a request is made by the ICC;¹⁷³
- the ICJ - in the course of a contentious decision, which may be relied upon subsequently by the ICC;¹⁷⁴
- the ICJ – in an advisory opinion on the request of the Security Council, acting in turn on the request of the ICC;¹⁷⁵
- the ICJ – in an advisory opinion on the request of the GA, acting in turn on the request of the ICC, in the event that the Council makes no determination or fails to utilise Article 16 within 12 months, in addition requiring a positive recommendation from the GA that prosecution proceed;¹⁷⁶

¹⁷² *Proposal Submitted by Greece and Portugal*, above n3; *2007 Coordinator's Draft*, above n2.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*; *Proposal by the Netherlands concerning PCNICC/2002/WGCA/RT.1*, above n3.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania*, above n3.

- the GA – in the event the Security Council fails to make a determination or does not make use of Article 16 within a specified time period.¹⁷⁷

In addition it has been suggested in informal negotiations that Security Council determinations could act merely as a green light, allowing the Court to proceed and in time make a second, independent determination.¹⁷⁸ Alternatively, it has been proposed that the Council determine the bare existence of an act of aggression and the ICC determine whether or not the act amounts to a ‘flagrant’ or ‘manifest’ violation of the Charter.¹⁷⁹

It is submitted that all of these compromise proposals are undesirable given they either share the flaws of Security Council determination outlined above, introduce new difficulties, or both.

ICC determination in the event the Security Council fails or chooses not to exercise any right granted to determine the existence or occurrence of aggression certainly overcomes the problem of the Court being hamstrung as a result of the Council’s simple failure to act, a real possibility given the Council’s historical reluctance to characterise uses of force as aggression. It does not, however, surmount additional concerns associated with Council determination. It leaves open the possibility that the Council could make a positive determination of aggression without an impartial, rigorous, legal analysis of the definition of aggression, or a determination in violation of the additional rights of an accused outlined above.

¹⁷⁷ 2007 Coordinator’s Draft, above n2.

¹⁷⁸ Comments made by delegates to the Intersessional Meeting of the SWGCA, 8-11 June 2006, Princeton University, New Jersey, notes on file with author. Roger Clark has made additional suggestions whereby the Security Council, GA or ICJ could determine whether there “[is sufficient evidence][are grounds] to believe that an act of aggression has been committed” as a precondition to the exercise of the Court’s jurisdiction, or, alternatively, determine that there is “*prima facie* evidence that a State has committed an act of aggression” prior to any determination being made by the Court. These options have not yet been discussed by the SWGCA. Memo from Roger Clark, January 2007, circulated to members of the Virtual Working Group of the SWGCA, on file with author.

¹⁷⁹ Roger S. Clark, ‘Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’ (2002) 15 *Leiden Journal of International Law*, 859, 876-877.

Another problem associated with this proposal is that the proposal as it currently stands is unclear as to the outcome in the event the Security Council makes a negative determination. While it is unlikely the Council would make an explicit negative determination, it is very possible that the Council could adopt a resolution positively characterising a use of force as a threat to, or a breach of, the peace. Such a resolution could be interpreted as a determination that the use of force in question did not amount to an act of aggression. The proposal could thus be interpreted as providing (or redrafted to provide) that a negative proposal would prevent the ICC from prosecuting aggression. Given the Council's traditional characterisation of serious illegal uses of force as threats to, or breaches of, the peace, rather than acts of aggression, the provision could effectively eliminate any real chance of the prosecution of aggression before the ICC.

Alternatively, the proposal could be interpreted as allowing (or redrafted to allow) the ICC to proceed to make the determination in the event that the Security Council was silent as to the characterisation of a particular use of force, or in the event that the Council instead determines that the conduct in question amounts to a threat to, or breach of, the peace. In other words, the only Council action that would prevent ICC prosecution would be if Article 16 was utilised. This would overcome the issue of the veto. It means, however, that the only element of Security Council deferment would be the binding nature of positive Council characterisations of aggression. This may be insufficient to act as an acceptable political compromise given the current positions of the P5 and their allies.

The alternative proposal currently allowing for ICC determination would see the Security Council having the first right of determination and the GA having a second right of determination before the ICC was allowed to act. Obviously this entails the same concerns in relation to Security Council determination as outlined in relation to the first compromise proposal. The involvement of the General Assembly as a third party does little to alleviate the concerns raised. The GA is a political body as much as the Security Council is; it lacks the ability to apply independent, rigorous legal analysis of the

definition of aggression and the ability to ensure the rights of an accused are upheld. These criticisms can be applied equally if the ICC were to be taken out of the picture as in the final proposal outlined above.

The remaining formal options all involve determination by the ICJ. The involvement of the ICJ is seen as attractive primarily because it would move the determination into a legal forum and because it would ensure consistency between at least the international courts on the question of aggression.¹⁸⁰ These are undoubtedly positive aspects of the compromise proposals. Unfortunately, any involvement of the ICJ raises different difficulties and concerns.

Two of the models are based on a request for an advisory opinion. It should first be noted that the Bosnia and Herzegovina, New Zealand and Romanian proposal gives the Security Council the first option of identifying aggression and would, even if a positive advisory opinion was obtained from the ICJ, require a recommendation from the GA that the ICC proceed with a prosecution. These additional requirements entail the same concerns as those outlined in relation to the alternative compromise proposals involving the GA. Of course, the key hurdle requirement is that before the ICJ can give an advisory opinion, either the Security Council or the GA must adopt a resolution seeking such an opinion. This opens up the possibility of the use of the veto in the Council. Securing a requisite majority in the GA may be equally as difficult.¹⁸¹

Additional, more specific problems arise. Concerns have been raised that a request for an advisory opinion asking whether or not an act of aggression had taken place would, at least in some circumstances, be tantamount to referring a contentious case for

¹⁸⁰ *Hermann Mosler & Karin Oellers-Frahm*, 'Article 96' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., 2002) 1179, 1182.

¹⁸¹ *Mosler and Oellers-Frahm* note that the required voting majorities for a decision to request an advisory opinion are unclear and suggest that a decision of the Council to make a request could be interpreted as a procedural matter within the meaning of Article 27(2) of the Charter. Whether or not a request from the GA requires a two-thirds majority as an 'important question' within the meaning of Article 18(2) of the Charter also appears to be unsettled, *ibid*, 1183.

resolution.¹⁸² While legal questions pending between two or more States are admissible for advisory opinions,¹⁸³ it is argued that the existence of an act of aggression could be the primary or sole point of dispute between States and as such, an advisory opinion on this question this could violate the principle of consent-based jurisdiction in contentious cases, as an answer to the question could amount to an adjudication of the dispute.¹⁸⁴ It could also compromise the Court were it subsequently asked to adjudicate a bilateral dispute between the subject aggressor and victim States.¹⁸⁵

In such a situation there is a real possibility that the ICJ would reject the request on grounds of judicial propriety.¹⁸⁶ The Permanent Court of International Justice did just this in the *Eastern Carelia Case*.¹⁸⁷ There the Court was asked to give an advisory opinion on the legal effect of Articles 10 and 11 of the Treaty of Dorpat relating to the status of Eastern Carelia, Repola and Porjärvi. Russia was not a member of the League of Nations at the time and had not given its consent to the dispute being settled by the Court. Referring to the rule that a State cannot, without its consent, be compelled to submit its disputes with other States to modes of pacific settlement, the Court held that: “The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving an advisory opinion, depart from the essential rules guiding their activity as a Court.”¹⁸⁸

¹⁸² Theodor Meron, above n6, 14; Hermann Mosler & Karin Oellers-Frahm, above n180, 1185; Matthias Schuster, above n6, 19.

¹⁸³ See Art 102(2) *International Court of Justice Rules of Court* adopted on 14 April 1978 and entered into force on 1 July 1978 as amended in September 2005.

¹⁸⁴ D. Stephen Mathias, 'The Definition of Aggression and the ICC: Remarks' (2002) 96 *American Society of International Law Proceedings*, 181, 184-185; Hermann Mosler & Karin Oellers-Frahm, above n182, 1187.

¹⁸⁵ *Ibid*, 184-185.

¹⁸⁶ *Ibid*, 1181, 1187.

¹⁸⁷ *Advisory opinion*, PCIJ 1923, Series B, No. 5.

¹⁸⁸ *Ibid*, 28-29. A similar issue arose in the *Western Sahara (Advisory Opinion)* ICJ Rep [1975] 6. Spain argued that the subject of the question submitted to the Court by the GA was substantially identical to Spain's dispute with Morocco regarding Western Sahara. Morocco had asked Spain to consent to the dispute being submitted to the Court, but Spain had refused such consent. Spain argued that disputes over territorial sovereignty required the consent of involved parties and that

The alternative proposal, which recommends that ICJ decisions in contentious cases be relied upon by the ICC is equally problematic. Criminal prosecutions before the ICC would be dependant upon States bringing parallel disputes to the ICJ. Among other things, this would exclude the possibility of trying the leaders of any State that has not consented to the ICJ's jurisdiction. This would be a serious limitation on the activities of the ICC. Moreover, even if one State were to request that the Court adjudge and declare that a second State was responsible for an act of aggression, as demonstrated in *DRC v Uganda*, the Court may be unwilling to adjudicate upon the occurrence of an act of aggression, as opposed to a breach of the prohibition against the use of force. It should also be noted that ICJ determination would not enhance the protection of an accused's rights. The ICJ employs a different standard of proof to the ICC. An individual accused would not be able to make individual submissions to the Court, unless able to make them via a State (which may not be possible considering, for example, the possibility of leaders being deposed after losing a war). Finally, proceedings before the ICJ can take a very long time.¹⁸⁹ This would be inconsistent with an accused's right to a trial without undue delay.¹⁹⁰

The Bosnia and Herzegovina, New Zealand and Romanian proposal was discussed above and rejected as a suitable compromise solution. One element of the proposal, however, that was not discussed is the suggestion that no special role in the prosecution of the crime of aggression be required for the Council in relation to referrals under Article 13(b) of the Rome Statute.¹⁹¹ The commentary to the proposal provides that: "...where the Security Council decides to refer a situation involving aggression to the Court under

the advisory jurisdiction of the Court was being used to circumvent the principle that the Court had no jurisdiction to settle a dispute without the consent of the parties. The Court on this occasion, however, was able to hold that the GA did not bring the question to the Court with a view to peaceful settlement but sought the advisory opinion to assist it in the exercise of its functions concerning decolonisation, meaning that the legal position of Spain would not be compromised. It was further held that the questions did not call on the Court to adjudicate existing territorial rights. It would arguably be far harder to draw such distinctions between an advisory opinion as to the occurrence of an act of aggression and a contentious dispute between States regarding State responsibility for a serious use of force.

¹⁸⁹ *Matthias Schuster*, above n6, 19.

¹⁹⁰ Article 67(1)(c) Rome Statute.

¹⁹¹ *Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania*, above n3.

article 13(b), nothing more is required to establish the precondition that aggression has been committed by the State concerned. ...what is contemplated here is the referral of situations that appear, at the time of referral, to involve possible crimes of aggression.”¹⁹²

It is not entirely clear whether it is suggested that it must appear to the Council that the situation being referred involves possible crimes of aggression, or whether it is the Prosecutor to whom the commission of the crime must be apparent. If it is the latter, the effect would be that if the Prosecutor forms the view that a crime of aggression has been committed in a situation that was referred to the Court by the Council under the existing provisions of Article 13(b), the Prosecutor would be able to proceed as he or she would in respect of the other crimes over which the Court has jurisdiction. This is potentially problematic as the possible prosecution of crimes of aggression without the involvement of the Council may mean that the Council would be reluctant to refer any situation to the Court under Article 13(b). This would end the Court’s ability to prosecute individuals whose State of nationality is not a party to the Statute, where the State on the territory of which the conduct in question occurred is also not a party (and those States have not accepted the jurisdiction of the Court pursuant to Article 12(3)) - nationals of States such as Sudan, over which the Court has obtained jurisdiction only by virtue of the Security Council’s adoption of Resolution 1593.¹⁹³ A lack of Council referrals may also be interpreted as a loss of crucial support, which may damage the Court’s reputation, and potential operating effectiveness.

On the other hand, if it is suggested that the Council must be of the view that the crime of aggression has been committed, presumably this would have to be communicated to the Court as part of the resolution referring the situation. This would step outside of the existing provisions of Article 13(b), which was carefully drafted to ensure that the Council refers only general situations to the Court and not specific crimes. It is also not clear how the Council would express such an opinion without coming awfully close (in political terms) to making a determination that an act of aggression had occurred. This would bring the proposal close to a ‘gate-keeper’ model, whereby Council determinations

¹⁹² *Ibid*, 3.

¹⁹³ Security Council Resolution 1593, UN SCOR, 5158th mtg, UN Doc S/RES/1593 (2005).

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as to the occurrence of an act of aggression are a necessary precondition to the exercise of the Court's jurisdiction in which a second, independent determination as to the satisfaction of the State act element of the crime is made. This raises the problem already discussed of the historical and political reluctance of the Council to identify prohibited uses of inter-State force as aggression which could result in the Court being only rarely actually able to exercise jurisdiction over the crime.

The alternative suggestion that the Council could be requested to make the determination as to the occurrence of an act of aggression, but the Court would be left to determine whether the act of aggression constituted a 'manifest' or 'flagrant' violation of the Charter is no less problematic. Aside from the complications that could arise in practice if the Court was of the opinion that there had in fact been no violation of the Charter, let alone a manifest or flagrant one (given the difficulties of neatly dividing these considerations) the proposal does not remove the concerns outlined in relation to the rights of an accused. An accused would still stand before the Trial Chamber of the ICC with a curtailed ability to dispute the charges against him or her.

In summary, it is submitted that each of the compromise proposals currently on the table are flawed to an extent that makes their successful adoption unlikely and perhaps also unwise.

3.2 A new compromise proposal

This article has contended that the serious concerns associated with prejudicial Security Council determination render that model unacceptable as a solution to the jurisdictional issue. At the same time, it has been acknowledged that *realpolitik* may prevent the adoption or successful operation of any model that allows for ICC determination independent of any special role for the Council. As such, while ideally independent ICC determination is favoured, the following compromise solution is suggested for a new Article 13 *bis*:

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1. *The Court may exercise its jurisdiction with respect to the crime of aggression in accordance with article 13 of this Statute, subject to the provisions in this article.*

2. *Where:*
 - (a) *a situation has been referred to the Prosecutor by a State Party in accordance with article 14 of the Statute; or*

 - (b) *a situation has been referred to the Prosecutor by the Security Council in accordance with article 13, paragraph (b) of this Statute;*

and the Prosecutor, having evaluated the information made available to him or her, determines that there is a reasonable basis to believe that a crime of aggression has been, or is being, committed and that an investigation should be initiated, the Prosecutor shall submit to the Pre-Trial Chamber a request for authorization of an investigation into a crime of aggression, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

3. *Article 15, paragraphs (1), (2) and (3) shall apply where the Prosecutor determines that it is appropriate to seek authorization to initiate an investigation proprio motu in relation to a crime of aggression. In addition, the request for authorization submitted to the Pre-Trial Chamber must specify that the authorization sought is related to a crime of aggression.*

4. *If the Pre-Trial Chamber, upon examination of a request and supporting material, decides that there is a reasonable basis to proceed with an investigation, it shall cause the Court to notify the Security Council that a request for authorization of an investigation into a crime of aggression has been received from the Prosecutor and request the Security Council for approval to proceed.*

5. *The Pre-Trial Chamber may authorize the commencement of an investigation by the Prosecutor into a crime of aggression, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case, if the Security Council adopts a resolution confirming that the investigation and possible prosecution of any crime of aggression arising from the facts notified to the Council will not interfere with the maintenance of international peace and security.*
6. *The refusal of the Pre-Trial Chamber to request approval from the Security Council shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same alleged crime of aggression.*
7. *The failure of the Security Council to adopt a resolution approving an investigation and possible prosecution of a crime of aggression shall not prevent the Court presenting a subsequent request to the Security Council based on new facts or evidence regarding the same alleged crime of aggression.*
8. *Nothing in this article shall prejudice the investigation and prosecution of other crimes within the Court's jurisdiction.*
9. *Nothing in this article shall prejudice the operation of article 16 of this Statute.*

Several features of the compromise proposal warrant further explanation. Firstly, it is intended that investigations into crimes of aggression may be triggered in the same way as other crimes under the Court's jurisdiction – by referral from a State Party or the Security Council or on the Prosecutor's own initiative. This is aimed at ensuring information relating to all potential crimes of aggression is at least brought to the attention of the Prosecutor and analysed by him or her. It also avoids the dangers of exclusive Security Council referrals outlined above.

It is suggested that, once the Prosecutor forms the view that there is a reasonable basis to believe that a crime of aggression has been or is being committed and that it is

appropriate to commence an investigation, the Prosecutor would have to seek the authorisation of the Pre-Trial Chamber to initiate the investigation. The first step towards authorisation is that the Pre-Trial Chamber must form the view that there is a reasonable basis to proceed with an investigation. Under the existing Statute, the authorisation of investigations is only required where the Prosecutor seeks to initiate them *proprio motu*. It is proposed that authorisation be sought in relation to all investigations into possible crimes of aggression¹⁹⁴ to guard against potential political investigations. Although this article does not suggest that the Prosecutor is at all likely to act other than in an independent and professional manner, it is noted that a number of States have raised concerns about the particularly political nature of the crime of aggression, thus it is believed that the additional protection against political investigations provided by a majority of the judges of the Pre-Trial Chamber is justified. On a procedural level, the Prosecutor's application to the Pre-Trial Chamber is also a means of triggering the request for approval to proceed from the Security Council.

Approval to proceed from the Security Council is the key feature of the proposal. As a basic concept, it is not entirely novel: the notion of Security Council authorisation has been suggested in brief synopsis by *Mark Stein*. Stein proposes that: "the ICC would be able to proceed in aggression cases, without Security Council approval, but only up to the point where charges against an accused are confirmed under Article 61 of the ICC Statute. After confirmation of the charges, further proceedings would require approval of the Security Council, subject to veto by the permanent members."¹⁹⁵

Stein's formula with its delayed authorisation process has initial appeal. Stein claims that it would allow an airing of the case against an accused, with a preliminary determination that the charges are sufficient to warrant a trial, which, Stein submits would place considerable political pressure on the Security Council to authorise further

¹⁹⁴ As opposed to only in relation to State referrals and investigations initiated *proprio motu*, as suggested by Belgium: *Proposal presented by Belgium on the question of jurisdiction of the Court with respect to the crime of aggression*, UN Doc. ICC-ASP/5/SWGCA/WP.1 (2007), 5.

¹⁹⁵ *Mark S. Stein*, above n30, 34-35. Stein would modify pretrial arrest procedure such that persons accused of the crime of aggression could only be arrested after Security Council approval.

proceedings.¹⁹⁶ It is contended, however, that those States that currently support Security Council determination (particularly the P5) are likely to find the prospect of their leaders being investigated and having charges of the commission of a crime of aggression confirmed against them unpalatable, even if the prosecution is ultimately unable to proceed. Moreover, while there may be some merit in having a case against an accused aired, the preparation of the case up until the point where charges are confirmed could be an enormous waste of valuable court resources if the case is ultimately not allowed to proceed, particularly given the likely enormous magnitude of investigations and case preparation in connection with crimes of aggression. Stein's proposal could also give rise to a source of tension between the Court and the Council, which is clearly undesirable in terms of the maintenance of the integrity of both bodies.

Another form of authorisation was contemplated by the SWGCA as part of a recent proposal, made informally by Sweden, for a modification of paragraph 4 of the 2007 Coordinator's Draft.¹⁹⁷ The text reads as follows (with the proposed amendments to paragraph 4 *italics*): "Where the prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned *or has declared that it does not object to the Court's [sic] proceeding with the case*. If no *such* Security Council determination *or declaration* exists, the Court shall notify the Security Council of the situation before the Court, *including any relevant information and evaluation thereof that might assist the Security Council in its deliberations.*"

This article considers the proposal as it stands to be problematic, as it still allows for Security Council determination of the occurrence of an act of aggression. As it is the author of the proposal's intention that the paragraph work in conjunction with one of the options outlined for paragraph 5 in the Coordinator's Draft,¹⁹⁸ it is also of concern that

¹⁹⁶ *Ibid*, 35.

¹⁹⁷ *Report of the Special Working Group on the Crime of Aggression*, UN Doc. ICC-ASP/5/SWGCA/3 (2007), 5.

¹⁹⁸ *Ibid*.

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the proposal would potentially allow for determination by the GA or the ICJ if the Security Council failed to act. Nonetheless, the notion of a declaration authorising the Court to proceed has potential.

The compromise proposal advanced by this article would seek approval from the Security Council before an investigation is commenced. This has the appeal (for the P5 and those States concerned to ensure that there is sufficient political support for the prosecution of crimes of aggression) of allowing the Security Council to prevent the investigation into any alleged crime of aggression. Most importantly, the adoption of the requisite resolution giving a green light to prosecutions could be blocked by the exercise of a veto. This distinguishes the provision from Article 16 of the Statute (which would continue to operate, and could be utilised after authorisation had been granted, if, for example, the international security situation changed). It is suggested that the ability of the P5 to exercise their veto is a necessary component of any compromise solution that is to be successful. While it inevitably means that some crimes of aggression may go unpunished, it appears certain that without the presence of the veto the Court's jurisdiction over the crime of aggression will never be activated, or at least not activated without the crucial support of key States.

The proposed form of Security Council authorisation is also important. Any reference to a resolution adopted under Chapter VII of the UN Charter has been deliberately omitted. This is because in order to adopt a Chapter VII resolution, the Security Council must make a determination under Article 39 that there exists a threat to, or breach of, the peace, or an act of aggression. This could in practice be interpreted as requiring a preliminary determination from the Security Council that there exists an act of aggression, which gives rise to serious concerns, as outlined in detail in this article. The suggested formulation, requiring a resolution confirming that the investigation and possible prosecution of any crime of aggression arising from the facts notified to the Council will not interfere with the maintenance of international peace and security is designed to allow the Council to authorise prosecutions without having to take any stand on whether or not, in its view, a crime of aggression has been committed. Of course, there

is nothing to prevent the Council from expressing such an opinion, but the opportunity to avoid it overcomes the hurdle of requiring the Council to ‘take sides’ in the event it deems that this would compromise its role. At the same time, it is suggested that the formula is consistent with the UN Charter in that it reflects the primacy given to security considerations when they conflict with considerations of international law.¹⁹⁹ It is anticipated that some will suggest that requiring a resolution of a particular type acts as a constraint on Security Council powers, which would be contrary to international law. In response, it is contended that the suggested provision places no limitation on the Council’s prerogatives – on the contrary, it limits only the Court’s ability to prosecute the crime of aggression, which otherwise, on the basis of international law, it would be free to do completely independently of the Council. Although more detailed, it is thus no different in this respect from the specification contained in Article 16 of the Statute.

Finally, the proposal aims at completeness by noting the ability of the Prosecutor to make further applications to the Pre-Trial Chamber, and the ability of the Court to make renewed requests to the Security Council, if new facts or evidence emerge. It also provides that the operation of Article 16 should not be affected, nor should the investigation and prosecution of other crimes within the Court’s jurisdiction. The intention here was to ensure that if a situation referred to the Prosecutor by a State Party or the Security Council gives rise to multiple crimes that, although investigation into crimes of aggression must go through a special process, the investigation and prosecution of other crimes would follow the normal course. Similarly, it would allow the Prosecutor to make a separate application under Article 15 to investigate *proprio motu* other crimes that arise out of the same factual matrix as a crime of aggression. It should be noted that the adoption of the proposal would require the amendment of existing provisions in the Statute, particularly the insertion of appropriate cross-referencing in Articles 15 and 53 relating to the Prosecutor’s ability to initiate investigations and the addition of a requirement in Article 57(2)(a) that a Pre-Trial Court order authorising an investigation into a crime of aggression must be concurred in by a majority of its judges.

¹⁹⁹ See for example Article 1(1) of the UN Charter.

4. Conclusion

This article has demonstrated that nothing in the Rome Statute or the UN Charter gives the Security Council the exclusive ability to determine the existence or occurrence of a State act of aggression. Indeed, this article has attempted to demonstrate that greater support can be found in the Charter for a requirement that determinations made for the purpose of international criminal law be made by a judicial body. An objective analysis of policy considerations also favoured a conclusion that the ICC, not the Security Council or any other body, should make all determinations relating to the State act element of the crime of aggression. Recognising that negotiations of the crime of aggression are guided by both law and politics, however, it was submitted that only a compromise solution will be successful.

The compromise suggested by this article has the principal benefit of ensuring that the determination of all elements of the crime of aggression is made by the International Criminal Court, not a political body. This would ensure that the rights of an accused are protected to the maximum extent possible and preserve the integrity of the Court. It is further submitted that the proposal maximises the possibility of securing Security Council authorisation.

Of course, in terms of the concerns raised in this article, the proposal has one significant flaw: that by allowing for the operation of the veto it carries the possibility of selective justice. As the Special Rapporteur for the Draft Code of Offences against the Peace and Security of Mankind, noted in his Ninth Report: “It would be shocking if, because a State had the right of veto, its leaders, or those of a State which it protected, were to be treated differently from the leaders of another smaller, or more isolated, State.”²⁰⁰

It is highly likely that were this solution to the jurisdictional issue adopted by the ASP, the P5 would use their veto (or the threat of the use of the veto) to shield their own leaders and the leaders of their close allies, at least while those leaders enjoy the support

²⁰⁰ *Report of the International Law Commission on the Work of its Forty-Third Session*, above n10, 91.

of governmental institutions. It is recognised that one of the Rome Statute's greatest successes and one of the reasons so many States have enthusiastically given their support to the Court is the fact that the Statute represents a challenge to the Security Council's monopoly in terms of its past establishment of ad-hoc international criminal tribunals and the P5's pervasive attempts to assert their dominance over areas of international interaction outside of the domain of collective security.²⁰¹ Equally it is recognised that the ability of any one of the P5 to prevent investigations into crimes of aggression would enhance their disproportionate and largely unwarranted power.

Although this is conceded, the reader's attention is drawn to Security Council Resolution 1422,²⁰² which activated Article 16 of the Statute to prevent the Court exercising jurisdiction over troops of non-State parties carrying out peacekeeping operations. The resolution was adopted after the US used its veto to stop the renewal of the UN Mission in Bosnia and Herzegovina and the International Police Task Force until the resolution was adopted.²⁰³ It might thus be contended that the power of the P5, or at least the US, is already able to be wielded in a way that would prevent any investigation or prosecution of a crime of aggression contrary to its interests.

At any rate, it is the position of this article that no compromise solution is going to be free from all flaws. And it is submitted that of all the potential flaws, selective justice is the least dangerous. This is particularly so when it is considered that the P5 are unlikely to ratify provisions relating to the crime of aggression if such a compromise is not adopted, meaning that one way or another it is inevitable that justice will be selective. And not only is it the least dangerous of the potential flaws, but the possibility of selective prosecutions appears to be the bastion of those currently supporting Security Council determination. Thus it is hoped that this significant concession might be sufficient to build consensus among the ASP.

²⁰¹ See for example *William A. Schabas*, above n7, 720.

²⁰² UN SCOR 4572nd mtg, UN Doc S/Res/1422 (2002).

²⁰³ See *M. El Zeidy*, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422' (2002) 35 *Vanderbilt Journal of Transnational Law*, 1503; *M. Weller*, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court' (2002) 78:4 *International Affairs*, 693, 706-708.