ABSTRACT

International Criminal Court (ICC), crime of aggression, accessory liability, universal jurisdiction, complementarity, leadership crime

Prof. G.G.J. Knoops
professor of International Criminal Law at Shandong University (Jinan, China) and has appeared as defense counsel at the ICTY, ICTR and SCSL
(Received 11 August 2013 Accepted 10 January 2014)

This article describes several issues that might arise once the amendments to the Rome Statute on the crime of aggression enter into force. A first issue relates to the jurisdictional mechanism pertaining to the crime of aggression. A second issue revolves around the various liability modes arising from the crime of aggression. Since the crime of aggression is a 'leadership crime' several liability modes that exist within the ICC Statute seem not to apply to this crime, such as accessory liability. Accomplices or third States aiding or inciting another State to commit an act of aggression, might be immune from prosecution. A third issue touched upon concerns the implementation of the crime of aggression at anational level. The principle of universal jurisdiction may empower States to prosecute individuals responsible for international crimes in their national courts. Yet, this might result in complementarity problems with regard to the crime of aggression. This article examines the complementarity 'test' applied by the ICC in order to determine the admissibility of a case and its ramifications that might arise from the crime of aggression.

Keywords: ICC, Human Righte IHL, Crime.

INTERNATIONAL CRIMINAL COURT (ICC), CRIME OF AGGRESSION, ACCESSORY LIABILITY, UNIVERSAL JURISDICTION, COMPLEMENTARITY, LEADERSHIP CRIME

PROF. G.G.J. KNOOPS*

1. INTRODUCTION

Daily life is entrenched with all kinds of acts of aggression; murder, rape, arson, burglary, assault, but also less physical acts such as insult, intimidation, reckless driving. Yet, aggression as such has not been elevated into a separate crime within most of the domestic criminal codes.It is likely that, as of 1 January 2017, aggression features as an international crime withinthe prosecutorial ambit of the International Criminal Court (ICC) system.Furthermore, it is not unlikely that, as

* Professor G.G.J. Knoops is visiting professor of International Criminal Law at Shandong University (Jinan, China) and has appeared as defense counsel at the ICTY, ICTR and SCSL. The author is indebted to Ms. Evelyn Bell LL.M., of the academic department of Knoops' advocaten for assisting in the process of writing this article.
International Studies Journal (ISJ), Vol. 11, No. 1, Summer 2014, pp. 1-31.

ICC State Parties are to transform the ICC crimes into their domestic criminal law systems, the crime of aggression may give rise to national prosecutions. The cardinal question is whether this prosecutorial expansion is to be seen as beneficial to international criminal justice. This article delves into several questions which are still left open by the drafters of the Rome Statute. First, is the ICC prosecutor still at liberty toproceed with an investigation into the crime of aggression, once the United Nations (UN) Security Council – a political organization – has not determined beforehand that a particular incident qualifies as a 'manifest violation of the UN Charter'? And what about the ICC judges; are they bound to such determination by the security council? Second, this article discerns the question as to the impact of the crime of aggression – being a leadership crime – on the liability forms of article 25 of the Rome Statute. And third, it addresses the question whether it is preferable for Statesto domestically investigate the crime of aggression pursuant to the principle of complementarity? Prior toexamining these questions, definitional issues related to the crime of aggression will be discussed.

2. DEFINING THE CRIME OF AGGRESSION

The inclusion of the crime of aggression in the Rome Statute was already debated during the 1988 Rome Diplomatic Conference and theDiplomatic Conference in 1998;yet no agreement on the definition of this crime and related jurisdictional issues could be reached.[1]The negotiation process resulted in the inclusion of the crime of aggression in the Rome Statute as one of its core crimes, yet, with the proviso that jurisdiction could only be exercised after agreement on its definition

1. Michael Scharf and Philip Hadji, 'Forward and Dedication: The International Criminal Court and the Crime of Aggression', 41 *Case Western Reserve Journal of International Law* 267 (2009).

and the conditions under which the Court could exercise jurisdiction.[1] Only in 2010, during the ICC review conference in Kampala (Uganda), agreement was reached on the crime of aggression.

Theextensive negotiation process preceding the adoption of the crime of aggression into the amendments of the Rome Statute is noteworthy when taking into account that 'crimes against peace' – the predecessor of the crime of aggression – were said to be the 'most important' crime prosecuted before the first international criminal tribunal, the Nuremberg tribunal.[2] In 1950 the International Law Commission adopted the so-called Nuremberg principles, in which 'crimes against peace' were defined as the:

> *'(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
>
> *(ii) Participation in a common plan or conspiracy for the accomplishment of the acts mentioned under (i).'*

During the ICC Review Conference in Kampala (Uganda)in 2010,the Assembly of State Parties adopted an amendment to the Rome Statute, defining the crime of aggression and the conditions under which the ICC could exercise jurisdiction. The amendment to the Rome Statute on the crime of aggression would enter into force no sooner than January 1, 2017 and only after 2/3 of the ICC Member States had ratified the amendments. During this conference, the Assembly of State Parties enacted the following definition of the crime of aggression:

1. Article 5(2) ICC Statute.

2. Robert Jackson, Report to the President by Mr. Justice Jackson (Oct. 7, 1946), available at <http://avalon.law.yale.edu/imt/jack63.asp>, accessed 31 December 2013; see also Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 360.

> *'The planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations' [emphasis added, GJK].1*

For the crime of aggression to be prosecuted, three constitutive elements arise:

1. First, in order to be prosecuted for the crime of aggression it must be proved that the individual was in a leadership position; and,

2. Second, for an individual to be prosecuted for the 'crime of aggression' an 'act of aggression' by the State must be established, which act is defined by article 8*bis* (2) of the Rome Statute as follows:

'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'

3. Third, a 'manifest violation of the UN Charter' must be stipulated; the word 'manifest' being susceptible to arbitrariness.

As to the contours of what an 'act of aggression' may constitute, sub (a) to (g) of Article 8*bis* (2)enumerate – not exhaustively – specific acts that mayqualify as an act of aggression, such as the blockade of ports or coasts of a State by the armed forces of another State, the bombardment or use of weapons by a State against the territory of another State or an armed attack by one State on the sea or air forces, or marine and air fleets of another State.

As noted, a distinction has been made between the 'crime of aggression' (article 8*bis* section 1 of the Rome Statute) and the 'act of aggression' (article 8*bis* section 2 of the Rome Statute). While the crime of aggression is a crime perpetrated by an individual, the act of

1. Article 8*bis*, sub 1 of the Rome Statute, inserted by resolution RC/Res.6 of 11 June 2010.

aggression is an act to be performed by a State. This differentiation is pivotal since 'aggression' requires State action and cannot be committed by an individual as such.[1]One of the constitutive elements of the 'ICC' crime of aggression is the legality of an act of the state. Legality in this context is to be determined onthe *jus ad bellum*principle, addressing the legality of the war. The other core crimes within the ambit of the ICC – war crimes, crimes against humanity and genocide – are based on the *jus in bello* principle, aiming at the legality of the conduct of war.[2]From this perspective, the crime of aggression constitutes a *sui generis* crime compared to the other ICC crimes.Since State criminal responsibility is a highly disputed concept within international criminal law[3], an act of aggression seems contradictory to this notion.

3. PITFALLS OF THE JURISDICTIONAL MECHANISM ON THE CRIME OF AGGRESSION

3.1. THE PROSPECTIVE SYSTEM

The newly established and complex system on the crime of aggression should operate as follows.Firstly, the ICC may exercise jurisdiction over the crime of aggression, after UN Security Council referral of an act of aggression.[4]The Security Council will determine on a case-by-

1. Appendix A to the 'Recommendations to the Administration regarding its approach to aggression negotiations', *American Branch of the International Law Association*, 19 March 2010.

2. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 361.

3. Nina H.B. Jørgensen, *Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2003).

4. The UN Security Council shall, pursuant to article 39 of the UN Charter, 'determine the existence of any threat to the peace, breach of the peace, or an 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' [emphasis added]; General

case basis, which specific acts constitute a 'manifest violation of the Charter'. The prosecutor must await the decision of the UN Security Council before initiating an investigation. Secondly,if the prosecutor intends to initiate an investigation *propriomotu*or in case of a State party referral, the UN Security Council will be called upon to establish whether an act of aggression occurred.[1] Once the Security Council determines that such an act took place, the prosecutor may proceed with the investigation; if the Security Council has not reached a decision within six months after the prosecutor's notification, a Pre-Trial Chamber should authorize the commencement of an investigation vis-à-vis a crime of aggression.[2]

As to Security Council referrals, a sensitive issue isthat five permanent UN Security Council members must haveconsensus on what exactly constitutes a 'manifest violation of the Charter'. Obviously, the five permanent members being Russia, China, France, the United Kingdom and the United States, will not likely qualify possible acts of aggression of their own forces(or their allies) as an 'act of aggression' against another State. They might be keento evade criminal responsibility of their political or military leaders.

Contrasted to Security Council referrals, *propriomotu* and State Party referrals are faced with complex jurisdictional obstacles. In case of *propriomotu*investigations or State Party referrals, the crime of aggression cannot be prosecuted before the ICC if (a) 'the State guilty of the act of aggression is not a State Party to the Rome Statute, in which event the ICC cannot exercise its jurisdiction over the crime of aggression committed by a national or on the territory of the non-party

Assembly Resolution 3314 (XXIX) of 14 December 1974, available at <http://unispal.un.org/UNISPAL.NSF/0/023B908017CFB94385256EF4006EBB2A>, accessed 20 December 2013; Article 15*bis* Rome Statute.

1. See article 15*bis* of the Rome Statute.

2. See article *15bis* section 8; see also Johan Van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court', *University of Miami National Security & Armed Conflict Law Review*, vol. 1 (2011), p. 2.

State; or (b) if the State concerned[i.e. the aggressor State, GJK], being a State Party, has submitted a prior declaration to the Registrar of the ICC that it does not accept the jurisdiction of the ICC over the crime of aggression.'[1] All of these conditions to activate the ICC's jurisdiction are created to secure that were the Security Council not to refer an act of aggression to the ICC, the Court is only to pursue such an act based on full consensus of the presumed aggressor and victim state. This empowers State parties ('presumed aggressors') to 'opt out' of the Court's jurisdiction for the crime of aggression.[2]

The introduction of the UN Security Council within this jurisdictional system was mainly due to the involvement of the United States (US). The US fulfilled a major role during the deliberations on the crime of aggression, while nothaving ratified the Rome Statute. The US sought the UN Security Council to assume the sole responsibility in deciding whether an act constitutes an act of aggression. The underlying idea being that it could evade being prosecuted for the crime of aggression in the future. The US feared that, being a major military power, it would be more exposed to ICC prosecutions than other States and that the legitimate use of force by USmilitary would be challenged the ICC.[3]This was precisely the decisive motive for the US from abstaining to ratifythe Rome Statute.The US Administration was actively involved in the process of drafting the Rome Statute and even though in 1998 both the Clinton

1. Johan Van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court', *University of Miami National Security & Armed Conflict Law Review*, vol. 1 (2011), p. 2.

2. See 'Conditions for action by the ICC', The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, available at <http://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/>, accessed at 14 February 2014.

3. Gergana Halpern and Lucy Betteridge, 'Questions & Answers on the Crime of Aggression and the United States: Negotiations of the ICC', *AMICC*, 19 August 2008, available at <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US%20Q&A.pdf> accessed 12 December 2013.

Administration and the US Congress indicated that it favored the ICC, in the end the US did not ratify the Rome Statute. During the Rome Diplomatic conference from 15 June – 17 July 1998, the US sought – contrary to the majority of the participating States – a UN Security Council-controlled Court. When this incentive failed, the US denounced the Rome Statute.[1]Hence, the crime of aggression was not exclusively put into the hands of the Security Council for purposes of commencing prosecutions. In the current system, the prosecutor can – after approval of three ICC judges – initiate an investigation, once the UN Security Council fails to reach a decision within six months on whether 'a manifest violation of the UN Charter' occurred.

3.2. PRACTICAL PROBLEMS

The jurisdictional ICC system on the crime of aggression is complex.[2]Three examples are illustrative for its complexity. First, it has been remarked that 'a Security Council determination of aggression is not a legal assessment but is based on political considerations'.[3]Suppose that two Iranian fighter jets shoot down an American drone east of Kuwait and this case is discussed within the UN Security Council because of a potential act of aggression from Iran towards the US. The UN Security Council– the US being one of the permanent members – decides to refer the case to the ICC under article 8*bis* (2)(d) which provision may qualifyas an attack by the

1. Michael P. Scharf, 'The Case for Supporting the International Criminal Court', Washington University School of Law, 2002; see also Fred Borch, 'The Law and Policy in U.S. Military Operations: Some Thoughts on the Impact of Decisions by the International Court of Justice, International criminal Tribunal for the former Yugoslavia, and the International Criminal Court', *Justice* 53, 2013, pp. 16-22 at p. 20-21.

2. See also G.G.J. Knoops, 'The International Criminal Court in 2010 Pitfalls and Progress of the ICC', Introductory Note International Criminal Court, *The Global Community Yearbook of International Law and Jurisprudence 2011.*

3. William A. Schabas, *An Introduction to the International Criminal Court3rd ed.* (Cambridge: Cambridge University Press, 2007), p. 137, referring to a statement made by Judge Schwebel of the ICC.

armed forces of a State on the air forces of another State, as an act of aggression. At this juncture, a double political factor arises. First, the transformation of such a military act as being 'aggression' is imbued with a political connotation. One State might qualify a certain act as an act of aggression, while another State might qualify the exact same act as an act of self-defense. Second, the UN Security Council, inherently a political organ, makes the call whether or not to prosecute. This political factor is more pertinent whenone of the permanent UN Security Council members is involved in the alleged conflict. As the ICC system advances with the introduction of the crime of aggression, it could create its own vulnerability for political influences.On the other hand, Article 15*ter* section 4 (similar to Article 15*bis* section 9) provides that 'a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings […].'

Second, the practical implications of the system can be quite radical for another reason.Also non-State Parties to the Rome Statute as well as State Parties who did not ratify the amendments on the crime of aggression, may be subjected to prosecution for the crime of aggression once the UN Security Council refers the case to the ICC.[1]A Security Council referral invokes the Court's jurisdiction irrespective the existence of an 'opt out' declaration of a State Party with the Registrar declaring not to accept the ICC's jurisdiction for the crime of aggression arising from an act of aggression.[2] The effects of these implications might be attenuated by a compromise which was entered into during the Kampala-conference of June 12, 2010. At that time, due to the US, the following amendment was agreed upon, namely that the crime of aggression 'shall not be interpreted as creating the

1. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 364.

2. Article 15*bis* (4) ICC Statute, Resolution RC/Res. 6.

right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.'[1] The US apparently holds the view that customary international law does not empower States to exercise universal jurisdiction over the crime of aggression.[2] However, the issue of exercising jurisdiction remains a matter of national sovereignty whereby a State cannot be sanctioned for exercising universal jurisdiction. Therefore it is questionable what the binding effect of this amendment will be.

Thirdly, Article 15*bis* section 8 reads: 'Where no such determination is made within six months […].' Does it say that the prosecutor may also proceed with an investigation when the Security Council arrives at a negative determination on whether a certain act qualifies as an act of aggression? The text of the Statute is silent on this issue. It seems not likely that a prosecutor will proceed once the Security Council finds that a certain act does not fall within the ambit of aggression.

4. THE CRIME OF AGGRESSION AND ITS IMPACT ON LIABILITY MODES

4.1. INDIVIDUAL LIABILITIES

Article 25 of the Rome Statute outlines the different liability modes for the crimes within the ICC's jurisdiction among which (in section 3 sub c) liability of accessories. While article 25(3)(a) aims at principal/direct liability, section 3 (b-d) advances accessorial liability.[3] Since the crime of aggression is by definition a leadership crime, the

1. Res. RC/Res. 6 Annex III, see also Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 365.

2. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 365.

3. See for this differentiation, *Prosecutor v. Thomas LubangaDyilo*, Trial Chamber I Judgment, ICC-01/04-01/06-2842, 14 March 2012, paras. 996-999.

liabilityof accessories endorsed by article 25(3)(b-d), such as committing, ordering, aiding and abetting, contributing and inciting[1], do not apply to this crime.[2] By confining the crime of aggression to persons'in a position effectively to exercise control over or to direct the political or military action of a State', possible accomplices are excluded from prosecution before the ICC.[3]Prosecution for the crime of aggression is thus limited to 'presidents, prime ministers, and top military leaders such as ministers of defense and commanding generals'.[4] Consequently, individual soldiers who executed 'orders of aggression' are apparently immune from criminal prosecution before the ICC.[5] The question is left open, however, whether States could nonetheless domestically prosecute such individuals.

Article 25 will be amended with a new sectionas soon as the crime of aggression enters into force. After paragraph 3 of Article 25, the following paragraph (3*bis*)will be inserted:

> *'In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State."*[6]

It is also not clear whether attempting to commit a crime within the

1. According to Article 25(3)(e) incitement is only punishable in respect of the crime of genocide.

2. Article 25(3) ICC Statute.

3. See also William A. Schabas, *An Introduction to the International Criminal Court3rd ed.* (Cambridge: Cambridge University Press, 2007), p. 139.

4. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 363; referring to Keith A. Petty, 'Sixty Years in the Making: The Definition of Aggression for the International Criminal Court', 31 *Hastings International & Comparative Law Review*, 2008,531, 547.

5. Johan van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court', *University of Miami National Security & Armed Conflict Law Review*, vol. 1 (2011), p. 19-20.

6. See Resolution RC/Res.6, The crime of aggression, adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

jurisdiction of the ICC, which is punishable under article 25(3)(f) of the Rome Statute, could apply to the crime of aggression since an*act of aggression* must first be established before a prosecution for the crime of aggression can be initiated.[1]

Furthermore, the 'leadership' nature of the crime of aggression seems tomake article 28 of the Rome Statute, under which superiors or military commanders may be held responsible for the crimes committed by subordinates,redundant.[2]However, in the new definition of article 25 (3*bis*) the criterion is 'effective control'; for the interpretation of this criterion guidance could be sought from case law of the ICTY and ICTR regarding superior responsibility.[3] After all, this doctrine revolves around the notion of effective control on part of the superior. Asuperior or military commander may be held criminally responsible for crimes committed by subordinates under his effective authority and control, including the situation where the superior fails to 'prevent or punish' crimes committed by his subordinates.[4]Such

1. See also Roger S. Clark, yet he considers that 'Resolution 3314 does not contemplate an "attempted aggression" by a State. Either the invasion, etc., takes place, or it does not. One can perhaps posit an attempt where troops are massed at the border but bombed into oblivion before they can move. Such unlikely cases for prosecution aside, the kind of attempts that could be contemplated are those where the actor tries to contribute to the "planning, preparation, initiation or waging" of an aggression that eventuates, but he fails in the effort to contribute' ; Roger S. Clark, 'The Crime of Aggression', in: CarstenStahn and GöranSluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: MartinusNijhoff Publishers, 2009), p. 720

2. See also William A. Schabas, *An Introduction to the International Criminal Court3rd ed.* (Cambridge: Cambridge University Press, 2007), p. 139.

3. See for example *Prosecutor v. Gotovina,*ICTY Appeals Chamber Judgment, IT-06-90-A, 16 November 2012.

4. Article 28(a) of the ICC Statute reads that: 'A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

liability can be incurred when a military commander knew or *should have known* that his forces were committing or about to commit crimes within the ICC's jurisdiction[1];knowledge encompasses the element of consciously disregarding information indicating that such crimes were committed or about to be committed by his subordinates.[2]Both article 8*bis* and article 25(3*bis*) do not embrace negligence standards such as a failure to prevent or punish, the disregard of information or the situation where the person in a leadership position should have known that crimeswithin the jurisdiction of the ICC were committed or about to be committed. Yet, the interpretation of the articles 8*bis* and 25 (3*bis*) could be fuelled by the mentioned ICTY-case law on superior responsibility. A flaw in these new provisions is the question whether the person in effective control, in terms of the crime of aggression, can rely on a defense averring that he or she had insufficient knowledge or information that his or her subordinates committed or were about to commit actions amounting to aggression; the new provisions of article 8*bis* and 25 (3*bis*) are seemingly silent on such scenarios.[3]

4.2. THIRD STATES

Limiting the crime of aggression to leaders seems consistent with the policy of the Office of the Prosecutor and is reflected by the gravity threshold applied by the Pre-Trial Chambers when judging on the admissibility of a case.[4] However, a (third) State inciting another State to commit an act of aggression or a (third) State aiding and abetting in

1. Article 28(a)(i) ICC Statute.

2. Article 28(b)(i) ICC Statute.

3. See also Johan Van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court', *University of Miami National Security & Armed Conflict Law Review*, vol. 1 (2011), p. 10.

4. William A. Schabas, *An Introduction to the International Criminal Court3rd ed.* (Cambridge: Cambridge University Press, 2007), p. 139.

the commission of such a crime, fall outside the ambit of ICC prosecution.[1]Such a scenario could imply that political or military leaders of the 'aiding' (third) State – even if they deliberately fail to prevent or punish potential illegal acts amounting to aggression – would (also) be immune from prosecution. Yet, it is tenable that the criterion 'in a position to effectively exercise control' also encompasses potential liabilities of the third 'aiding' State. The effective penal purpose of the crime of aggression would otherwise be rendered moot.

5. IMPLEMENTATION OF THE CRIME OF AGGRESSION AT DOMESTIC LEVEL

5.1. THE SCOPE OF NATIONAL PROSECUTIONS FOR AGGRESSION

One of the main procedural obstacles pertaining to the crime of aggression revolves around the discretionary powers of national States to expand jurisdiction for the crime of aggression with the doctrine of universal jurisdiction.

According to the preamble of the Rome Statute State Parties have a duty to prosecute individuals responsible for international crimes in their national courts.[2] Under the principle of complementarity – enshrined by both Article 1 and Article 17 of the Rome Statute – it is envisaged that the ICC is a court of last resort, meaning that the ICC

1. William A. Schabas, *An Introduction to the International Criminal Court3rd ed.* (Cambridge: Cambridge University Press, 2007), p. 139.

2. In the preamble to the Rome Statute it is affirmed "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and it is recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", see <http://www.oas.org/dil/Rome_Statute_of_the_International_Criminal_Court.pdf>, accessed 13 December 2013.

will only act if national courts are unwilling or unable to prosecute or carry out an investigation.Several national systems have implemented legislation that authorizes them to prosecute international crimes under the principle of universal jurisdiction, which is defined as 'the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests'.[1]As soon as the Kampala amendments on the crime of aggression enter into force, State Parties could be at liberty to exert universal jurisdiction over this crime.[2]Exercising universal jurisdiction over this crime carries several problems.

The UN Security Councilis endowed with the possibility to refer a situation to the ICC in case of an alleged act of aggression, as agreed upon during the Kampala conference. The UN Security Council can even refer situations of non-state parties or parties who have not ratified the amendments on the crime of aggression. States who endeavor to frustrate an ICC prosecution for the crime of aggression could simply create universal jurisdiction over this crime in order to initiate domestic prosecutions to this end. If a (non-ratifying) State aims to prevent itsresidents from being prosecuted before the ICC, that State could, pursuant to the complementarity principle, request to execute the investigation itself. The prospects of a (non-)State Party to have a case of aggression domestically investigated and prosecuted could increase if such State relies on universal jurisdiction.[3]An illustrative example in this regard is the case where Belgium sought to

1. Universal Jurisdiction, A preliminary survey of legislation around the world, *Amnesty International*, October 2011, available at <https:// www.amnesty. org/ en/ library/ asset/ IOR53/004/2011/en/ d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf>, accessed 13 December 2013.

2. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 364.

3. Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 365; example Senegal-Belgium.

prosecute the former president of Chad, Mr. Habré, for crimes of torture and crimes against humanity. Mr. Habré had sought residence in Senegal and Senegal did not intend to extradite Mr. Habré to Belgium. The judges in Dakar, the capital of Senegal, responded to Belgium's extradition request and held that the Senegalese court could not 'adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State'.[1] The judges opined that head of state immunity should 'survive the cessation' of a (former) president's duties.[2]A day after this judgment, Senegal referred the case to the African Union. The assembly of heads of state of the African Union mandated Senegal to prosecute and try Mr. Habré.Subsequently, Senegal started implementing legislative reforms in order to bring its national laws in conformity with the Convention against Torture while incorporating several international crimes in its Penal Code.[3]According to Belgium, Senegal was obliged to extradite Mr. Habré because it proved unable to prosecute him. Belgium lodged an application at the ICJ based on the principle of*autdedereautjudicare* ('to prosecute or extradite') principle. In 2012, the ICJ found that Senegal had failed to submit the case of Mr. Habré to the competent national authorities for prosecution, yet it endowed Senegal – if it would not extradite Mr. Habré – with the opportunity to submit the case to its competent judicial authorities.[4]Similar situations could occur before the ICC, as to(non-

1. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of 20 July 2012, available at <http://www.icj-cij.org/docket/files/144/17086.pdf>, accessed 20 December 2013.

2. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of 20 July 2012, available at <http://www.icj-cij.org/docket/files/144/17086.pdf>, accessed 20 December 2013.

3. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of 20 July 2012, available at <http://www.icj-cij.org/docket/files/144/17086.pdf>, accessed 20 December 2013.

4. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of 20 July 2012, available at

)State Parties assuming universal jurisdiction over the crime of aggression.[1]

5.2. ADMISSIBILITY PROBLEMS

Apart from jurisdictional obstacles, the admissibility stage could reveal other flaws in the ICC system. Suppose, State A unilaterallydecides to launch an 'on the spot'military attack against State Bfor reasons of State B having violated a UN weapons embargowhich endangers the security of State A. The UN Security Council condemns the attack and decides to refer the case to the ICC. It is established thatan alleged 'act of aggression' took place under Article *8bis* (d) of the Rome Statute by the armed attack of State A on the land of State B. The president of State A was in a position to effectively exercise control over the military and thus the investigation launched by the ICC focusses on the 'crime of aggression'committed by the president of State A.While investigating this fictitious case, the ICC is confronted with an application lodged by State B, challenging the admissibility of the case under the complementarity principle of Article 17 of the Rome Statute in conjunction with Article 19(2)(b).[2]On the basis ofArticle 17 the ICC must declare a case inadmissible, if the case is already being prosecuted by a State which has jurisdiction over it, unless the State proves unwilling or unable to genuinely carry out the proceedings.[3] The ICC is aware of the fact that the concept of complementarity goes to 'the heart of States' sovereign

<http://www.icj-cij.org/docket/files/144/17086.pdf>, accessed 20 December 2013.

1. Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Summary of the Judgment of 20 July 2012, available at <http://www.icj-cij.org/docket/files/144/17086.pdf>, accessed 20 December 2013.

2. Article 19(2) of the Rome Statute proscribes who may challenge the jurisdiction of the Court or the admissibility of a case on the grounds referred to in Article 17. Article 19(2)(b) dictates that such a challenge may be made by "a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted".

3. Article 17(1)(a) Rome Statute.

rights', that States have a right to exercise jurisdiction over crimes that fall within the ambit of the ICC and are even compelled to do so under the preamble of the Rome Statute.[1]Suppose the ICC was left with no other option than to hold the case inadmissible, thus leaving the prosecution of the President of State A up to State B? It is debatable whether this would result in a fair trial; one party to the conflict would be allowed to prosecuteand judge the other party to the conflict.Imaginable is that such prosecutions might be detrimental to international and diplomatic relations between States.[2]The following part examines the criteria stipulated by the ICC in determining the admissibility of a case under Article 17 of the Rome Statute, in order to illustrate – based on said fictitious case – the pragmatic problems arising from domestic prosecutions for the crime of aggression.

5.2.1. THE ADMISSIBILITY-TEST UNDER THE COMPLEMENTARITY PRINCIPLE

According to Article 17 (1) of the Rome Statute the ICC shall determine that a case is inadmissible where:

1. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution;

2. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

3. The person concerned has already been tried for conduct which

1. *Prosecutor v. Muthaura, Kenyatta and Ali*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Pre-Trial Chamber II, 30 May 2011, ICC-01/09-02/11, para. 40; paragraph 6 of the preamble to the ICC Statute reads that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

2. See also Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* 2 (2012), 381.

is the subject of the complaint, and a trial by the court is not permitted under article 20, paragraph 3;

4. The case is not of sufficient gravity to justify further action by the Court.

In the case example of State A and State B, the armed attack was of sufficient gravity to justify further action –as is already implied by the Security Council referral –while the President of State A has not yet been prosecuted for the attack. State B is conducting an investigation and decides to prosecute the President of State A for the crime of aggression. Thus, condition (a) must be determined in this case, which is also the central point in the actual admissibility challenges before the ICC.[1] Both conditions (a) and (b) of Article 17 are dealt with on the basis of a two-prong test, namely the 'same conduct / same person test' and the 'unwillingness / inability test'. A case may be declared inadmissible on the basis of either one of these two grounds. Yet, the first test must be answered in the affirmative in order to proceed to the second test.

In examining the admissibility challenge, the ICC applies the following two-prong test:

1. 'whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative,

2. whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.'[2]

1. See admissibility challenges in: *the Prosecutor v. Katanga, the Prosecutor v. Lubanga, The Prosecutor v. Saif al Islam Gaddafi, the Prosecutor v. Abdullah Al-Senussi, the Prosecutor v. Muthaura, Kenyatta and Ali.*

2. *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the admissibility of the case against Abdullah Al-Senussi", Pre-Trial Chamber I, 11 October 2013, ICC-01/11-01/11, para. 26 (hereinafter: "*Al Senussi* Admissibility Decision"; referring to, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", Appeals Chamber, 25 September 2009, ICC-01/04-

In order to have the first prong fulfilled, a comparison must be drawn between the conduct attributed to the defendant in the proceedings before the ICC and the conduct that forms the subject-matter of the proceedings allegedly carried out at a national level.[1]This test was applied in the admissibility challenges of Libya, as will be discussed in the following paragraph.

5.2.2. ADMISSIBILITY CHALLENGES IN THE CASE OF LIBYA

In 2013, Libya challenged the admissibility of two cases before the ICC. Libya insisted on domestically prosecuting both Saif Al-Islam Gaddafi, the son of the ousted leader Muammar Gaddafi, and Abdullah Al-Senussi, the former head of intelligence under the Gaddafi-regime, while the ICC was already investigating the cases upon a UN Security Council referral.[2]In the case of Mr. Al-Senussi, the ICC Pre-Trial Chamber required the consecutive identification of the following two aspectsin order to establish that the 'same case' was being investigated at a national level as put before the ICC:

1. 'the conduct of Mr Al-Senussi that is allegedly subject of the proceedings before theCourt; and

2. the conduct of Mr Al-Senussi that is allegedly subject to Libya'snational proceedings, as emerging from the evidence presented by Libya insupport of its claim.'[3]

The Chamber analyzed the arrest warrant that was issued against Mr. Al-Senussi on the basis of Article 58 of the Rome Statute to assess whether the 'same case' requirement was met. The arrest warrant identified specific incidents subject to investigation,

01/07-1497, paras 1 and 75-79; "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", Pre-Trial Chamber I, 7 December 2012, ICC-01/11-01/11-239, para. 6.

1. Al Senussi Admissibility Decision, para. 67.

2. See UN SC Resolution 1970, S/RES/1970 (2011).

3. Al Senussi Admissibility Decision, para. 67.

whichincidents were compared with the domestic investigations conducted by Libya.[1] Let's assume that – in the fictitious case of State A and B – the first prong of the two-step test as applied by the ICC is fulfilled (i.e. the Chamber was satisfied that the facts investigated by State B covered the same factual elements of the conduct of the President of state A as purported in the proceedings before the ICC).

The criterion'unwilling or unable'within the second prongfinds clarification in Article 17 (2) and (3) of the Rome Statute. Although a case may be declared admissible before the ICC on the basis of either unwillingness or inability of the national State, it has been noted that in practice 'the same factual circumstances may often have a bearing on both aspects'.[2]

5.2.3. INABILITY

According to Article 17(3) a State may be found unable to prosecute if the State is unable to gain custody of the accused or to obtain necessary evidence and testimony or otherwise unable to carry out the proceedings, due to a 'total or substantial collapse or unavailability of its national judicial system'.[3]In the fictitious example, State B can rely on a stable judicial system and its trials are internationally recognized as fair. At the same time, the accused – the President of State A – is already held in custody of State B,while there are numerous of witnesses readily available to provide testimony as to the attack conducted by State A.

5.2.4. UNWILLINGNESS

A State may be found unwilling to prosecute if there has been an unjustified delay in the proceedings or if the proceedings are

1. Al Senussi Admissibility Decision, para. 165.
2. Al Senussi Admissibility Decision, para. 169.
3. Article 17(3) ICC Statute.

undertaken for purposes of shielding the person concerned from criminal responsibility for the crimes within the jurisdiction of the Court.[1]In the mentioned example: State B cannot be found unwilling to prosecute on the basis of these two obstacles; there has been no unjustified delay and no reasons or indications for the shielding of crimes. State B will encounter more difficulties as far as the third option concerns, pertaining to whether a State might be unwilling to prosecute. On the basis of Article 17(2)(c) of the Rome Statute a State may be declared unwilling to prosecute if it can be established that:

> *'The proceedings were or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.'*[2]

Within the context of the State A-B example, it can be questioned whether the 'other side' of the conflict (State B) can be viewed as independent and impartial. However, this does not automatically imply that the *proceedings* are not being conducted independently or impartially and that they are inconsistent with the intent to bring the person concerned to justice. According to ICC case law as well as the Statute, the complementarity principle reflects a preference for national investigations and prosecutions.[3] The national State, in this example State B, endeavoring a domestic prosecution, must, however, substantiate the requirements set forth by law when

1. Article 17(2)(b) and (a)

2. Article 17(2)(c).

3. The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Decision on the admissibility of the case against Abdullah Al-Senussi", Pre-Trial Chamber I, 11 October 2013, ICC-01/11-01/11, para. 26; Pre-Trial Chamber I, "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 31 May 2013, ICC-Ol/ll-Ol/ll-344-Red, para. 52 (hereinafter: "Gaddafi Admissibility Decision").

challenging the admissibility of the case before the ICC.[1] The ICC furthermore considers that a discussion on unwillingness or inability is only meaningful where the genuineness of the national proceedings or investigations is at stake.[2]

In order to determine willingness and ability of the national State, the Chamber will assess significant features of the national laws. While examining these national laws, the Pre-Trial Chamber accrues weight to the following factors: the relevant laws and procedures applicable to the case on a domestic level, rights accorded to the accused, the ratification of human rights instruments, the right to legal representation, different trial phases, the right to appeal, independency between the judiciary and the prosecutor, recording of all proceedings in relation to the accused's case at the investigative stage.[3]Noteworthy, weight is attached to independency between the judiciary and the prosecutor. Yet, independency is the potential flaw within the ICC system on the crime of aggression. As illustrated,only after Security Council referral, the ICC can initiate a prosecution for the crime of aggression. A prior determination by the Security Council as to a 'manifest violation of the UN Charter' may give rise to the perception of a politically influenced prosecution.

Noticeably, nearly all admissibility challenges of national states before the ICC were rejected due to the 'same case test' and were declared admissible, except for the case of Mr. Al-Senussi which was declared inadmissible on 11 October 2013 by the ICC Pre-Trial Chamber.[4]Issues of unwillingness have thus been scarcely addressed. In the case of Saif al Islam Gaddafi, for example, issues of impartiality

1. Id.

2. Id.; Gaddafi Admissibility Decision, para. 53.

3. See for example Al SenussiAdmissibility Decision, para. 203-206.

4. See admissibility challenges in: the Prosecutor v. Katanga, the Prosecutor v. Lubanga, The Prosecutor v. Saif al Islam Gaddafi, the Prosecutor v. Abdullah Al-Senussi, the Prosecutor v. Muthaura, Kenyatta and Ali.

were not discussed at length, because Libya's admissibility challenge was rejected by the Pre-Trial Chamber due to the Chamber not being persuaded that the investigation in Libya covered the same conduct as the investigation before the ICC. Additionally, the Chamber was not persuaded that Libya was able to genuinely carry out an investigation against Mr. Gaddafisince the Libyan government had failed to 'secure legal representation for Mr Gaddafi'[1] and since he was not within the powers of the government; rather he was in custody of the Zintan militia.[2]The Chamber opined that it did not need to address 'the implications of the alleged impossibility of a fair trial for Mr Gaddafi on Libya's willingness genuinely to carry out the investigation or prosecution', since the case was already admissible before the ICC for this reason.[3] Besides, fair trial considerations had already been addressed by the Chamber in relation to Libya's inability to carry out the proceedings.[4] In conclusion, the Pre-Trial Chamber rejected Libya's admissibility challenge, saying that Gaddafi should be tried by the ICC.

The admissibility challenge of Mr. Al-Senussi delved into Libya's alleged unwillingness and inability to investigate the case, since the 'same case test' had been met. The defense of Al-Senussiaverred that Libya was unwilling to prosecute Mr. Al-Senussi, because of a lack of independence and impartiality in the national system while advocating that Libya was unable to prosecute Mr. Al-Senussi because of the unavailability of the national judicial system. The defense raised the precarious security situation in Libya as a ground that would impact upon the proceedings against Mr. Al-Senussi.[5] Libya itself did not dispute the precarious security situation. Yet, the Chamber opined that

1. Gaddafi Admissibility Decision, para. 213.
2. Gaddafi Admissibility Decision, para. 206-208, 219.
3. Gaddafi Admissibility Decision, para. 218.
4. Gaddafi Admissibility Decision, para. 217.
5. Al SenussiAdmissibility Decision, para. 260.

in order to establish 'inability' under Article 17(3) of the Rome Statute, 'not simply any "security challenge" would amount to the unavailability or to a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings.'[1]The defense argued that Libya had not sufficiently demonstrated that Mr. Al-Senussi's fair trial rights were not violated during the national proceedings. It was, for example, unclear under what circumstances Mr. Al Senussi had been arranged before a judge, it was unclear whether he had been tortured and it was unclear whether his rights had been respected.[2]In this regard the Chamber held that the 'uncertainties' identified by the defense could not be regarded as 'issues properly raised before the Chamber such that Libya would be under the duty to disprove them in order for the Admissibility Challenge to be upheld.'[3] The national State's burden of proof could not merely be equated with 'an obligation to disprove any possible "doubts" raised by the opposing participants in the admissibility proceedings.'[4]

Furthermore, the defense, as well as the Office of Public Counsel for Victims (OPCV), contended that the criminal proceedings in Libya could not be conducted independently and impartially. This was exemplified by the fact that the presiding judges in cases against former officials of the Gaddafi-regime appeared to have taken part in the so-called 'special courts' of the Gaddafi-era, by not excluding them from the current trials, the integrity of the process could not be ensured.[5] Additionally, the recent entry into force of the 'Political Isolation Law' was invoked by the defense in order to demonstrate the

1. Al Senussi Admissibility Decision, para. 261.
2. Al Senussi Admissibility Decision, para. 238.
3. Al Senussi Admissibility Decision, para. 239.
4. Al Senussi Admissibility Decision, para. 239.
5. Al Senussi Admissibility Decision, para. 246.

absence of impartiality and independence in the Libyan judicial system. This law 'has widely been condemned as being discriminatory against former Gaddafi-era officials and a gross breach of their human rights'.[1]

The Chamber elucidated that:

> *'submissions of a general nature indicating significant defects of Libya's national judicial system may be relevant as "contextual information", information of this kind can be considered only to the extent that such systemic difficulties have a bearing on the domestic proceedings against Mr Al-Senussi, such that it would warrant a finding of one of the scenarios envisaged under article 17(2) or (3) of the Statute.'*[2]

The Chamber was not persuaded that the information provided by the defense and OPCV amounted to:

> *'a systemic lack of independence and impartiality of the judiciary such that would demonstrate, alone or in combination with other relevant circumstances, that the proceedings against Mr Al-Senussi "are not being conducted independently or impartially and they [...] are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring [Mr Al-Senussi] to justice", within the meaning of article 17(2)(c) of the Statute.'*[3]

As a result, the admissibility challenge by Al-Senussi's defense was denied, implying that Libya's former head of intelligence could be

1. Al Senussi Admissibility Decision, para. 246.
2. Al Senussi Admissibility Decision, para. 245.
3. Al Senussi Admissibility Decision, para. 258.

tried in Tripoli by the Libyan authorities.[1]

5.3. CONCLUSION: PROSECUTING THE CRIME OF AGGRESSION AT A NATIONAL LEVEL?

In conclusion, it can be said that the burden of proof predominantly lies with the State challenging the admissibility of the case before the ICC under the complementarity principle (i.e. the State must demonstrate the existence and adequacy of national proceedings). In the mentioned example; State B ought to persuade the ICC Pre-Trial Chamber that it would be able and willing to prosecute the president of State A. Yet, mere doubts as to impartiality of the national system raised by a party is not sufficient to sustain an admissibility challenge; likewise not 'any security challenge' amounts to unwillingness or inability. At the same time the standard set by the ICC with regard to the unwillingness or inability of a State does not seem very burdensome.[2]Once the State is able to meet thetests set forth by the ICC it is likely that a case will be prosecuted on a national level, especially since this has the preference over international proceedings. In this way, the sovereignty of national States can be respected, as well as possible rights of victims, witnesses and defendants who are in the vicinity of the trial. Yet, it is questionable whether States are capable of investigating a crime of aggression on a national level under the principle of complementarity.Once a State successfully challenges theadmissibility of a potential ICC prosecution for aggression, a situation will arise where one side of the conflict will be permitted to domestically prosecute the other side of the conflictwith

1. The defense appealedon behalf of Mr. Al-Senussiagainst the Pre-Trial Chamber's Admissibility Decision on 17 October 2013.

2. Although it must be noted that it is tricky to draw inferences from a single case – the case of Mr. Al-Senussi, where the alleged unwillingness and inability of Libya was discussed at length. The appeal against the Pre-Trial Chamber decision of 11 October 2013 is still pending.

the increased risk of having a politically based prosecution. It is uncertain whether this will result in a fair trial for the accused and how this will impact upon international relations.

6. CONCLUSION

The 'new' crime of aggression, as agreed upon by the ICC Assembly of States parties during the 2010 Review Conference, creates several legitimacy obstacles. First and foremost, a political organ being at the basis of a potential ICC prosecution; the UN Security Council is endowed with the task to either determine whether the ICC may proceed with investigating a crime of aggression or to refer a crime of aggression to the ICC arena. Before a crime of aggression can be investigated, an 'act of aggression' must be established. Will the determination of a 'manifest violation of the UN Charter'be legally binding for the ICC?Is theICC benchat liberty to defy such assessmentonce the UN Security Council determines that an act of aggression took place?Will the ICC be compelled to prosecute upon such a political referral?

A second difficulty relates to the ambivalent nature of aggression as a 'leadership crime'; restricting the scope of liability modes pursuant to article 25 of the Rome Statute. Since the crime of aggression is by definition a leadership crime, it appears to exclude the liability of accessories as provided for in article 25(3)(b-d) of the Rome Statute. Defying liability modes, such as aiding and abetting, inducing, soliciting, inciting (e.g. a third State encourages another State to commit an act of aggression) and contributing, might lead to the immunity for third-States supporting the aggressor States.

A third difficulty pertains to the effects of the complementarity principle in that States themselves could be empowered to domestically prosecute potential aggression crimes against leaders of

'hostile' States. It might result in the situation where one side of a conflict is imbued with the power to prosecute the other side of the conflict and to actually scrutinize another State's policy. This could turn into a form of victor's justice, which has been one of the main criticisms of the Nuremberg tribunals.

At the end of the day, political, economic, religious and ethnic – and not purely judicial – motives within the UN Security Council could determine the fate of a military operation conducted by a State; a State which avers to have acted within the boundaries of, for example, anticipatory self-defense could be subjected to criminal prosecution by the adversary State. Overviewing all the theoretical and practical obstacles, it is not unlikely that the introduction of the crime of aggression within the Rome Statutecould undermine the legitimacy of international criminal law. It could strengthen States such as the US, China and Russia in their position to denounce the Rome Statute. At the same time, relying on the veto-system in the UN Security Council, these super powers are accrued with the instrument to initiate 'prosecutions' of other (non-friendly) States for the crime of aggression. Introducing international crimes within the systemof international tribunals, through the creation of jurisdictional mechanisms underpinned by geopolitical processes, seems a dubious operation within the ICC's objectives of achieving peace through justice.