

**THE FUTURE CRIME OF AGGRESSION: THE INTERPLAY  
BETWEEN ICC AND UNSC**

**By**

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**Dissertation Submitted in Partial Fulfillment of the Requirements for the  
Degree of Master of International Law (LLM- IL) of Mzumbe University**

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## **LIST OF ABBREVIATIONS AND ACRONMYS**

CICC	-	Coalition for International Criminal Court
GA	-	General Assembly
ICC	-	International Criminal Court
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for Yugoslavia
ILC	-	International Law Commission
IMT	-	International Military Tribunal
MU	-	Mzumbe University
SC	-	Security Council
U.S	-	United States
UN	-	United Nations
UNSC	-	United Nations Security Council
WWI	-	World War one
WWII	-	World War Two

## ABSTRACT

The crime of aggression is one of the grave crimes under international law and touches the concern of the international community as a whole. Despite its inclusion in the Rome Statute, 1998 the International Criminal Court (ICC) has no jurisdiction over the crime due to nonexistence of clear definition and elements constituting the crime. The proposed amendments to the Rome Statute through the Resolution RC/Res. 6 of 2010, define the crime of aggression and specify its elements. However, the Resolution RC/Res. 6 subjects the jurisdiction of the ICC to the mandate of the UN Security Council. In this situation, the ICC cannot exercise its jurisdiction over the crime of aggression directly unless the UN Security Council has first determined the existence of an act of aggression with regard to such allegations. This has a direct effect to the institutional independence of the ICC and it creates jurisdictional complications on the crime of aggression.

The general objective of this dissertation was to analyse the Resolution RC/Res. 6 with regard to the jurisdiction of the ICC on the crime of aggression by examining the interplay between the ICC and the UN Security Council. For the purpose of this study, the researcher applied doctrinal legal research, field research and library research and undertook the study within the regions of Dar es Salaam, Dodoma and Morogoro in Tanzania. For the purpose of data collection, the researcher obtained primary data by the use of interview and questionnaire methods as well as documentary review for secondary data. The collected data was analysed through qualitative data analysis.

Generally, the findings show that, most of the respondents are still in doubts as to whether the crime of aggression will be effectively tried by the ICC due to the pre-determination requirement set by the Resolution RC/Res. 6. The researcher concludes that, the UN Security Council may use this power to delay proceedings of the crime of aggression at the ICC hence affecting the future of the crime and confidence of the international community over the crime.

## **LIST OF INTERNATIONAL INSTRUMENTS AND DECLARATIONS**

### **International Instruments and Resolutions**

International Military For the Far East, adopted on 19<sup>th</sup> January, 1946

The African Charter on Human and People's Right, adopted on 27<sup>th</sup> June, 1981

The Covenant of the League of Nations, adopted 28.06.1919

The General Treaty for the Renunciation of War, adopted on 27<sup>th</sup> August, 1928

The Rome Statute of the International Criminal Court, adopted on 17<sup>th</sup> July, 1998.

The United Nations Charter, adopted on 26<sup>th</sup> June, 1945

### **International Declarations**

Affirmation of the Principles of International Law recognised by the Charter of the Nuremburg Tribunal, G.A Res. 95(1). UN GAOR, 1<sup>st</sup> Session, 55<sup>th</sup>Plen. Mtg., (1946)

GA Res. 3344(XXIX) adopted on 14.12.1974.

Moscow Declaration on German Atrocities of 30 October 1943.

Resolution RC/Res 6, 11.06.2010

The London Agreement of 8 August 1945 (The London Agreement, 1945)

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.0 Introduction

Aggression involves a grave breach of international law by the state and forms part of the forbidden acts of states under international law.<sup>1</sup> Such a breach may either threaten or breach international peace and security. In essence, aggression is committed by a state against another state. However, Contemporary developments of international law particularly at the end of the Second World War, has linked an individual who is in a position to plan, initiate or execute aggression with the liability for acts of aggression.<sup>2</sup> The reason behind linking individuals with acts of aggression has been argued to the extent that, the commission of international crimes though in law is seen to be done by states but in reality is done by individuals and by punishing these individuals, international law will be seen to be enforced.<sup>3</sup>

The linkage of an individual to acts of aggression committed by the state has resulted to a crime of aggression under international criminal law.<sup>4</sup> Unlike other international crimes under article 5 (1) of the Rome Statute, the ICC has no jurisdiction over the crime of aggression.<sup>5</sup> Its jurisdiction may be activated in January 2017 depending on the decision to be taken by the member states to the Rome Statute.<sup>6</sup> Despite this hope of jurisdiction over the crime of aggression, the ICC will only exercise its powers if the UN Security Council has first determined the existence of an act of aggression on such particular allegations of the crime of aggression.<sup>7</sup>

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<sup>1</sup>Article 1(1) of the UN Charter, 1945.

<sup>2</sup> After the Second World War, various perpetrators were tried at the Nuremburg and Tokyo Tribunals for crimes against peace which is equivalent to the crime of aggression.

<sup>3</sup> Memorandum submitted by the Secretary General to the United Nations General Assembly and the International Law Commission (1949). *The Charter and Judgement of the Nuremburg Tribunal; History and Analysis*. Lake Success, New York. p. 41

<sup>4</sup>Article 5 of the Rome Statute, 1998.

<sup>5</sup> Ibid. Article 5 (2)

<sup>6</sup>Article 15 (3) *bis* and article 15 (3) *ter* of the Resolution RC/Res 6, 2010.

<sup>7</sup>Ibid. Article 15 (6) *bis*.

Even where the UN Security Council remains mute for a period of 6 months after the notification of the alleged crime of aggression, the prosecutor cannot proceed with the investigations unless the trial chamber has authorised him and if the Security Council has not exercised its deferral powers.<sup>8</sup> These requirements create complications on the exercise of the ICC's jurisdiction on the crime of aggression and generally affect the institutional independence of the ICC.

This study was intended to show the jurisdictional difficulties of the ICC over the crime of aggression created by the Kampala Resolution RC-Res.6. The major aim was to identify the possible factors which may create challenges to the exercise of the ICC jurisdiction if it will be activated in 2017 and to comment on the future of the crime of aggression due to the nature of the UN Security Council and its resolutions. This study is very important to be carried at this moment where the Resolution RC-Res.6 has not yet been officially adopted and due to a series of debates on the exercise of the ICC's jurisdiction on the crime of aggression.

### **1.1 Background to the Problem**

Aggressive wars are said to have been used by nations against other nations for ages. Historical review reveals that, in 1268 Conradin von Hohenstaufen was tried for waging aggressive war.<sup>9</sup> The trial of Conradin is also said to be the first trial in world history for waging aggressive war.<sup>10</sup> However various sources do not give a detailed history of the trial and the rules used during Conradin's trial for waging aggressive war.

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<sup>8</sup> Ibid. Article 15 (8) *bis*

<sup>9</sup> Cryer R, Friman H, Robinson D and Wilmschurst (2010) *An Introduction to International Criminal Law and Procedure*, Second Edition, New York: Cambridge University Press. p. 312

<sup>10</sup> Bassiouni C.M (2013) *Introduction to International Criminal Law*, Second Edition, Martinus Nijhoff Publishers. pp. 1047 and 1048

In 1758, Emmerich de Vattel, a Swiss jurist addressed the illegality nature of aggression under international law.<sup>11</sup> In his Law of Nations Emmerich de Vattel stated as follows,

*the sovereign who takes up arms without a lawful cause is chargeable with all the evils, all the horrors of the war, all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy... he is guilty of a crime against his people... finally he is guilty of a crime against mankind in general, whose peace he disturbs...*<sup>12</sup>

Vattel's view on aggression came during the period when force was used between states as a legitimate instrument of national policy. Although during this period states had a right to wage war against other states, often the end results of these wars were cruelty, bloodshed among combatants and noncombatants and left untold sorrow to civilians.<sup>13</sup> With these tragic results states started regulating the legality of waging wars among themselves and the rules of war.<sup>14</sup>

By the end of the First World War states began organising themselves for the purpose of banning wars and the use of war as a means of pursuing national policies. At international level, the members of the League of Nations agreed to preserve their territorial integrity and political independence against aggression.<sup>15</sup> The members of the League also declared a matter of concern to the whole league, any war or threat of war whether affecting any of the members or not and agreed to take measures to

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<sup>11</sup>Ferencz, D.M (2010) The Crime of Aggression: Some Personal Reflections on Kampala, Leiden Journal of International Law, Volume 23, No. 04, December 2010. pp 905 - 908

<sup>12</sup>Ferencz, D.M. Op. Cit.

<sup>13</sup>NicoSchrijver (2003) The Use of Force under the UN Charter: Restrictions and Loopholes. The ACUNS 2003

<sup>14</sup> The Hague Conferences of 1809 and John W. Holmes Memorial Lecture. Retrieved March 22, 2016 from the World Wide Web: [acuns.org/wp-content/uploads/2012/09/WebPageSchrijver\\_UseofForce.pdf](http://acuns.org/wp-content/uploads/2012/09/WebPageSchrijver_UseofForce.pdf) 1907 are good examples for states' intention to regulate the legality of international wars.

<sup>15</sup>Article 10 of the Covenant of the League of Nations.

ensure peace of nations is safeguarded.<sup>16</sup> Generally, members of the League of Nations intended to achieve international peace and security by accepting the obligation not to resort to war.

Official condemnation of wars came in August 27, 1928 when the United States of America and other powers concluded the general treaty for renunciation of war as an instrument of national policy in Paris in which they condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy.<sup>17</sup> Instead the contracting parties agreed to settle their differences by peaceful means.<sup>18</sup> The concluded Kellogg Briand Pact during this period is currently the basis for banning acts of aggression under customary international law.<sup>19</sup>

Despite these international efforts on ban of war through the League of Nations and the Kellogg Briand Pact, the international community did not stop the occurrence of the Second World War (WW II). Due to the WW II, the leaders of the governments of the United Kingdom, United States and the Soviet Union met at Moscow in 1943 and declared to punish German officers and members of the Nazi Party who took part in the atrocities, massacres and executions during the World War II.<sup>20</sup>

Two years later the same three governments together with France signed an agreement in London for the establishment of International Military Tribunal which had to try these war criminals of the WW II.<sup>21</sup> In the London Agreement, the Charter of the international Military Tribunal (The Nuremburg Charter) was annexed. Among other things, the Nuremburg Charter provided for the composition and jurisdiction of the Tribunal.

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<sup>16</sup> Ibid. Article 11

<sup>17</sup> Article I of the General Treaty for Renunciation of War as an Instrument of National Policy (The Kellogg - Briand Pact), 1928

<sup>18</sup> Ibid. Article II

<sup>19</sup> Cryer. Op. Cit. p. 313.

<sup>20</sup> Moscow Declaration on German Atrocities of 30 October 1943.

<sup>21</sup> The London Agreement of 8 August 1945 (The London Agreement, 1945)

Article 6 of the Nuremburg Charter provided and defined the crimes within the jurisdiction of the tribunal. Among them were the Crimes against peace defined under paragraph (a) as planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Thus, the crime of aggression emerged as a crime against peace during the Nuremburg trials which took place immediately after the Second World War.<sup>22</sup> According to Ian Brownlie, the provisions of the crimes of aggression as provided in the Nuremburg Charter were the result of a compromise which was based on making a charge of launching aggressive war alternative or additional to a charge of initiating war in violation of treaties.<sup>23</sup> Prosecution of the crime of aggression under the name of crimes against peace proceeded also during the criminal trials at the Tokyo International Military Tribunals.<sup>24</sup>

Taking into consideration the importance of the principles derived from the Nuremburg Charter and the decisions of the Nuremburg tribunal, the UN General Assembly adopted a resolution 95(1) which confirmed and recognised these principles as international law principles.<sup>25</sup> The International Law Commission was then charged with the duty of working on those principles and formulating them.<sup>26</sup> Among other things, the Commission defined aggression but such definition was never accepted by the UN General Assembly.<sup>27</sup> The origin and development of the problem of this study can be seen to have started during this period when conflicting views on definition and jurisdiction on aggression arose.

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<sup>22</sup>Cryer. Op. Cit. p. 312

<sup>23</sup>BaekBuhm-Suk, (2006) "The definition and jurisdiction of the crime of aggression and the International Criminal Court", Cornell Law School Graduate Student Papers, Paper 19.p. 9. Retrieved December 21, 2015 from the World Wide Web: [http://scholarship.law.cornell.edu/lps\\_papers/19](http://scholarship.law.cornell.edu/lps_papers/19)

<sup>24</sup> Ibid.

<sup>25</sup>Affirmation of the Principles of International Law recognised by the Charter of the Nuremburg Tribunal, G.A Res. 95(1). UN GAOR, 1<sup>st</sup> Session, 55<sup>th</sup>Plen. Mtg., (1946)

<sup>26</sup>Cryer. Op. Cit. p. 314

<sup>27</sup> Ibid.

In 1974, the UN General Assembly succeeded to adopt the definition of aggression through a resolution 3344.<sup>28</sup> According to the Resolution 3344, a war of aggression is a crime against international peace and that aggression gives rise to international responsibility.<sup>29</sup> With this provision, the UN General Assembly distinguished responsibility for the war of aggression into a crime of aggression which invokes individual criminal responsibility and an act of aggression which invokes responsibility of the state.<sup>30</sup> However a Resolution 3344 of the General Assembly being a soft law could not bind the UN Security Council in its determination of acts of aggression

When dealing with aggression under international law in 1996, the ILC attempted to draw a distinction between defining aggression as an act committed by the state and aggression as a crime committed by an individual.<sup>31</sup> In so doing, the ILC proposed the elements of the crime of aggression by targeting individuals. Article 16 of the ILC's Draft Code of Offences against the Peace and Security of Mankind provided that, an individual who, as a leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state shall be responsible for a crime of aggression.

Again the ILC's proposals on the crime of aggression did not succeed before the UN.<sup>32</sup> When these proposals were transmitted to the Rome Conference on the establishment of the ICC, they were not agreed upon.<sup>33</sup> The main debate on these proposals was based on the definition of the crime of aggression and the role of the UN Security Council on determination of acts of aggression. As a result the crime of aggression was inserted under article 5(1) of the Rome Statute, 1998 without a definition and the jurisdiction over it.

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<sup>28</sup> GA Res. 3344(XXIX) adopted on 14.12.1974. The definition of the act of aggression is under article 3 of the annexed text to the Resolution. This definition will be discussed more in chapter three of this paper.

<sup>29</sup> Ibid. Article 5.2 of the annexed text to the Resolution 3344(XXIX)

<sup>30</sup> Cryer. Op. Cit.

<sup>31</sup> BaekBuhm-Suk. Op. Cit. p. 11

<sup>32</sup> Ibid. p. 12.

<sup>33</sup> Cryer. Op. Cit. p. 316

After a long period of working on the definition and the jurisdiction of the crime of aggression, a resolution RC/Res. 6 of 11 June 2010 was adopted in Kampala-Uganda. It amends the Rome Statute, 1998 on the definition and elements of the crime of aggression as well as the jurisdiction over the crime of aggression.<sup>34</sup> The resolution clearly defines the crime of aggression and provides for its jurisdiction.<sup>35</sup> Looking at a resolution RC/Res. 6, the UN Security Council maintains its primary role of determining acts of aggression before the ICC exercises its full jurisdiction over the crime.<sup>36</sup>

A consensus reached in 2010 at Kampala on the definition and jurisdiction of the crime of aggression still leaves questions on the interplay between the UN Security Council and the ICC over crime of aggression.

## **1.2 Statement of the problem**

The inclusion of the crime of aggression in the Rome Statute without activating ICC's jurisdiction over it is due to disagreement of the member states on the definition of the crime itself and the proposals of the International Law Commission, which gave the UN Security Council a primary role to determine an act of aggression before the ICC prosecutor initiates investigations on the crime.<sup>37</sup> But after a long discussion, a consensus has been reached through resolution RC/Res. 6 on the definition of the crime of aggression and ICC's jurisdiction over it.

Unlike other offences under the Rome Statute, the ICC will not have automatic jurisdiction on the crime of aggression.<sup>38</sup> Unless the UN Security Council determines the existence of an act of aggression, the ICC prosecutor cannot initiate investigation on the crime of aggression, whether that power to investigate arises *proprio motu* or by state referral.

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<sup>34</sup> Regarding the exercise of jurisdiction, articles 15 (3) *bis* and 15 (3) *ter* of a resolution RC/Res.6 state that, the ICC shall exercise its jurisdiction over the crime of aggression after 1 January 2017 when all legal requirements are fulfilled

<sup>35</sup> See articles 8 *bis*, 15 *bis* and 15 *ter* of the Resolution RC/Res 6, 2010.

<sup>36</sup> *Ibid.* Article 15*bis* (6).

<sup>37</sup> Cryer, *et al.* Op. Cit. p. 316

<sup>38</sup> Paragraphs 6 and 7 of article 15*bis* of the Resolution RC/Res 6, 2010

Although the prosecutor can proceed to investigate the crime of aggression when authorized by the pre-trial division after the UN Security Council fails to make a determination within six months,<sup>39</sup> yet his powers to initiate proceedings on the crime of aggression still depends on determination of the act of aggression which needs to be done by the Security Council first, the failure of which gives rise to delay or wastage of time by the Security Council.

Triggering jurisdiction of the ICC by the UN Security Council on the crime of aggression creates complications on jurisdiction of the ICC on the crime of aggression and the prosecution of the crime of aggression generally. The prior determination of acts of aggression by the executive body of the UN is also likely to affect the institutional independence of the ICC particularly on the crime of aggression.

Indeed, the resolution RC/Res 6 has subjected the ICC to the mandate of the UN Security Council. In that situation, the interplay between the ICC and the UN Security Council on the crime of aggression creates doubts and difficulties to the prosecution of the crime after the ICC's jurisdiction will be fully activated. Further, these complications raise doubts even on the future of the crime of aggression itself.

### **1.3 Research Hypotheses**

- (i) The voting system in the UN Security Council on determining acts of aggression will always hinder prosecution of the crime of aggression and the future of the crime itself.
- (ii) The determination of an act of aggression will always be influenced by the politics of the UNSC hence delaying investigations of the crime of aggression by the ICC prosecutor
- (ii) Institutional independence of the ICC on the crime of aggression and confidence of the international community on prosecution of the crime of aggression is highly affected due to subordination of the ICC to the

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<sup>39</sup> Paragraphs 8 of article 15*bis* of the Resolution RC/Res 6, 2010

UN Security Council whose decisions are influenced by the politics of its permanent members.

## **1.4 Objectives of this Research**

### **1.4.1 The General Objective**

This study is generally based on analysis of the Resolution RC/Res 6 on the jurisdictional difficulties and institutional independence of the ICC regarding the crime of aggression.

### **1.4.2 Specific Objectives**

This particular research study seeks to achieve the following specific objectives:

- a) To examine the effectiveness of the ICC in prosecuting international crimes independently without being interfered by external entities or organs.
- b) To analyse the interrelationship between the ICC and the UN Security Council in the context of the UN Charter and the Rome Statute on the jurisdiction of the crime of aggression.
- c) To find out factual and legal issues which led to subordination of the ICC jurisdiction on the crime of aggression to the UN Security Council.
- d) To examine the nature of the UN Security Council's decisions on substantive matters and assess on its readiness and effectiveness on determining every act of aggression for the ICC prosecutor to investigate it in time.
- e) To examine the future of the crime of aggression and pinpoint the factors likely to weaken jurisdiction of the ICC on prosecuting the crime of aggression.

## 1.5 Significance of the Research

This study has the following significances;

- a) This study reflects the ongoing debate on the crime of aggression and the ICC. Hence it answers important questions regarding the jurisdiction of the ICC and the role of the UN Security Council on the crime of aggression.
- b) The findings regarding the effect of UN Security Council's intervention in the jurisdiction of the ICC on the crime of aggression will be very useful to member states especially during this period of ratification of the amended Rome Statute.
- c) Further, this study adds knowledge to international criminal law students, experts of international law, lawyers and other interested persons on the crime of aggression generally and in particular on the interplay between the UN Security Council and the ICC on prosecuting the crime of aggression.

## 1.6 Literature Review

The focus point of this dissertation is on the future crime of aggression, the analysis of the ICC to prosecute on the crime, with the interference of UNSC. This dissertation considers various scholarly literatures looking on how the authors of the said literature have explained with regards to the crime of aggression and the law thereto. The consultation will be from different literatures including available books, reports, articles, presentation and online materials from electronic sources. Further, this part will show the gap left by other authors and utility of these authoritative works to this study.

**Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst**<sup>40</sup> have written on the crime of aggression under international criminal law. According to the authors, customary international law links aggression to an unlawful act of a state.<sup>41</sup> At the international level, Aggression was for the first time tried before the Nuremburg

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<sup>40</sup>Cryer R. et al. Op, Cit. pp. 312 - 328

<sup>41</sup> Ibid, p. 312

international Military Tribunal under the name of 'crimes against peace'.<sup>42</sup> The authors trace historical development of the crime of aggression under international law in the London Charter which established the Nuremberg Tribunal, the Charter for the Tokyo International Military Tribunal and Control Council Law No. 10 which all together provided the definition of crimes against peace.<sup>43</sup>

The judgement of the Nuremberg Tribunals on crimes against peace formed the basis for the UN's discussions on the crime of aggression and the draft statute on the establishment of the ICC which was proposed by the International Law Commission in 1994.<sup>44</sup> The authors further point out that, the major jurisdictional controversial issues from the start were, the definition of the crime and the role of the UN Security Council in determination of acts of aggression.<sup>45</sup> No consensus was reached with regard to these two issues, hence the crime of aggression was inserted in the Rome Statute with article 5(2) to exclude jurisdiction of the ICC on the crime.<sup>46</sup>

By the time the authors were writing this book, agreements on the definition and elements of the crime of aggression as well as the jurisdiction of the ICC on the crime were not reached. Therefore, the authors have written nothing on resolution RC/Res 6 which amends the Rome Statute on the crime of aggression. However the author's discussion of the crime of aggression, especially on the historical development and controversial issues pointed above is of great relevant to this study. Hence, this work is very important to the discussion of the complications brought by the ICC and the UN Security Council on the prosecution of the crime of aggression.

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid. p. 313

<sup>44</sup> Ibid. pp. 315 to 316

<sup>45</sup> Cryer R. et al. Op, Cit. p. 316

<sup>46</sup> Ibid.

**Robert Manson**<sup>47</sup> has based his argument on the role of the UN Security Council in determination of acts of aggression for the purpose of triggering ICC jurisdiction on the crime of aggression. The author shows how article 39 of the UN Charter authorises the UN Security Council to determine acts of aggression.<sup>48</sup>

Generally, the author's view is based on the fact that, the ICC jurisdiction on the crime of aggression has been subordinated to the political will of the UN Security Council. The author argues that, the decision of the Council on the existence or non existence of acts of aggression binds the ICC, hence amounting to a procedural bar on any subsequent investigation or prosecution for the crime of aggression.<sup>49</sup> The author generally finds the UN Security Council interfering with the administration of justice by the ICC.

The author uses various cases to demonstrate interpretation of Chapter VII of the UN Charter and how article 39 of the charter confers exclusive authority of the UN Security Council on determination of situations of use of force and acts of aggression.<sup>50</sup> Indeed the author has clearly criticised this authority as a pre-condition to the triggering of ICC jurisdiction on aggression. This is very important for this study particularly on the politics underlying the UN Security Council and its interference in the administration of Justice by the ICC.

**Gabriel Maria Lentner**<sup>51</sup> has written an article on the role of the UN Security Council in connection with the crime of aggression. The author has provided the history of the crime of aggression, its development at the Nuremburg Tribunal and how it was treated by the UN and during the negotiations for the adoption of the Rome

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<sup>47</sup> Manson, R. The ICC, the Security Council and the Crime of Aggression. International law Versus real politik? Retrieved November 14, 2015 from the World Wide Web:

<http://www.bepj.org.uk/wordpress/wp-content/2007/05/international-law-versus-real-politik.pdf>

<sup>48</sup> Ibid, p. 2

<sup>49</sup> Ibid.

<sup>50</sup> Manson, R. Op. Cit. pp. 3 to 7

<sup>51</sup> Lentner G.M, The Role of the Security Council in connection with the Crime of Aggression. Retrieved November 14, 2015 from the World Wide Web:

[https://intlaw.univie.ac.at/fileadmin/user\\_upload/int\\_beziehungen/Internetpubl/lentner.pdf](https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/lentner.pdf)

Statute.<sup>52</sup> Further, the author discusses the development of the crime of aggression before and during the review conference for the crime at Kampala.<sup>53</sup> Of more important to this work, the author discusses the powers of the ICC and UN Security Council on aggression.<sup>54</sup>

According to the author, the UN Security Council and the ICC have different obligations over the crime of aggression conferred to them by their constitutive acts.<sup>55</sup> The obligation of the UN Security Council over aggression is based on maintenance of international peace and security while ICC is based on prosecution of the crime of aggression. Under article 39 of the UN Charter, the Security Council determines acts of aggression for the purpose of carrying out necessary measures or sanctions under Chapter VII of the Charter against non compliant states.<sup>56</sup> The author's interpretation of article 39 above is that, the determination of the UN Security Council on the existence or non existence of the crime of aggression is without prejudice to the findings of other international organs.<sup>57</sup>

Basically the author is in support of the concurrent powers of the ICC and the UN Security Council over aggression.<sup>58</sup> Although the author bases his arguments in support of the concurrence powers only but this discussion is generally useful to the study particularly on the historical development of the crime of aggression and the role of the UN Security Council and the ICC jurisdiction over the crime of aggression.

**Antonio Cassese and Paola Gaeta**<sup>59</sup> have also written on the crime of aggression in their international criminal law book. According to the authors, the jurisprudence of aggression has been slow to develop because the offence is too politically charged to

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<sup>52</sup> Ibid, pp. 6 to 10

<sup>53</sup> Ibid, pp. 10 to 14

<sup>54</sup> Ibid, pp. 4 and 5

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, p. 5

<sup>57</sup> Lentner G.M., Op. Cit.

<sup>58</sup> Ibid.

<sup>59</sup> Cassese A, Gaeta P, Baig L, Fan m, Gosnell C and Whiting A (2013) *Cassese's International Criminal Law*, Third Edition, UK: Oxford Press. pp. 131 and 136 to 145

be defined in sufficiently and exhaustive criminal provisions that permit international independent judicial bodies to adjudicate.<sup>60</sup>

The authors have also discussed the definition and the elements of the crime of aggression as adopted at the ICC Kampala Review Conference. Although the authors have touched important things which are also useful to this study, they have not discussed the issue of jurisdictional complications on the crime of aggression which arose in the ICC Kampala Review Conference. Thus, there was a gap to be filled by this study particularly on jurisdictional complications over the crime of aggression.

**KederAkman's**<sup>61</sup> work was much interested due to the role of the UN Security Council in the prosecution of the crime of aggression. According to the author, one of the most problematic issues that led to ICC Kampala Review Conference is the role of the UN Security Council in the prosecution of the crime of aggression especially by distinguishing between the state act of aggression and the individual responsibility for that state act which results to criminal responsibility.<sup>62</sup> The author shows how various other authors' arguments base on different roles played by the ICC and the UN Security Council on the crime of aggression and add that these roles should not necessarily be conflicting ones and for the purpose of the UN Charter, the Security Council must also have an important role.<sup>63</sup>

However, the author views issues of politics of the five permanent members of Security Council and their veto powers as the likely issues which will harm the credibility of the ICC on the crime of aggression.<sup>64</sup> Actually, the author has discussed a lot on the crime of aggression and the challenges which the court would face as regards its jurisdiction on the crime. Much of this is relevant to this study, hence this

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<sup>60</sup> Ibid, p. 131

<sup>61</sup> Akman, K. (2013). *Challenges for the International Criminal Court and the Crime of Aggression - Jurisdiction, Immunity and Politics*. (Thesis in public international law) Faculty of Law, Stockholm University. Retrieved November 14, 2015 from the World Wide Web: <http://su.diva-portal.org/smash/get/diva2:704089/FULLTEXT01.pdf>

<sup>62</sup> Akman, K.. Op. Cit. p. 6

<sup>63</sup> Ibid. pp. 39 and 40

<sup>64</sup> Ibid. pp. 40 and 41

thesis became useful to this study also particularly on the jurisdictional challenges of the ICC on the crime of aggression.

**Cale Davis and his co-authors** have based their arguments on the crime of aggression under the Rome Statute, 1998 and its definition and jurisdictional regime under the amended Rome Statute, 2010. Generally the authors criticise the definition of the crime of aggression and the role of the UN Security Council on the crime of aggression under the amended Rome Statute, 2010. Indeed the authors are trying to show how a Resolution RC/Res.6 which amended the Rome Statute in 2010 weakens the foundations of the ICC.

According to the authors, the powers of the UN Security Council to impede the Prosecutor's investigations into the crime of aggression under a Resolution RC/Res.6, may be used by the permanent five members of the Council to retain their veto powers, to shield their citizens or the citizens of their allies from prosecution.<sup>65</sup> It is also argued that, the political nature of the UN Security Council and its decisions on acts of aggression highlights the risk of adding political context to the jurisdiction of the ICC, hence undermining the role of the ICC as an independent judicial organ.<sup>66</sup>

The authors also criticise the definition of the crime of aggression under a Resolution RC/Res.6 as being too political since it is based on the UN General Assembly Resolution 3344 which was designed as a political guide for Security Council. The arguments and critiques of the authors on the crime of aggression and the ICC are of great importance to this work particularly on the weaknesses and challenges of the ICC on prosecution of the crime of aggression.

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<sup>65</sup> Ibid. p. 11

<sup>66</sup> Davis C, et al. Op. Cit.

## **1.7. Research Methodology**

### **1.7.1. Types of research**

#### **Doctrinal Legal Research**

The major type of research conducted by the researcher for the purpose of achieving the objectives of this study was Doctrinal Legal Research. The nature of the study requires an analysis of the laws conferring jurisdiction to the ICC and the exercise of powers to the UN Security Council on the crime of aggression. This being the case, it was necessary for the researcher to apply Doctrinal legal research which enabled him to analyse relevant international legal rules and principles with regard to this study.

This type of research being based on analysis of international laws and principles, the researcher utilised library resources to obtain information from international law instruments, case and law reports, books, journals, periodicals, articles and papers. In achieving this, the researcher visited the following libraries; Chinua Achebe Library of Mzumbe University (Main Campus) in Morogoro, University of Dodoma Library and Dodoma Regional Library in Tanzania. Enquiries from experts' views on the subject matter of this study were also centered on reference to the applicable laws and principles recognised at international law.

However, for the application of effective methods of data collection, it was necessary for the researcher to apply one more type of research in addition to Doctrinal Legal Research; that is field research. The need to acquire primary data from various respondents indicated in this study necessitated the application of field research. Field research was generally aimed at acquiring more reliable information and the views of various individuals possessing knowledge and experience on matters on international law.

#### **Field Research**

Field research enabled the researcher to obtain primary data through the use interview and questionnaire methods. With the interview and questionnaire methods the

researcher managed to obtain information from international law lecturers and students at Mzumbe University, University of Dar es Salaam and University of Dodoma, international law department at the office of the Attorney General in Dar es Salaam, Ministry of Foreign Affairs and International Cooperation as well as from other lawyers in private chambers in Dar es Salaam and Dodoma.

### **1.7.2. Research design**

This study was mostly based on literature review research design in which the researcher made reference to various published and un-published works, international law instruments, resolutions and cases when accomplishing this study. The study is divided into five chapters. Each chapter has been designed and structured to contain specific information and carry different themes all of which relate to the problem of this study.

The chapters are further divided into sub chapters headings and subheadings. This design was intended to ensure the logical flow of ideas and technical issues of each chapter and subchapters from the background of the problem, statement of the problem, objectives, hypothesis and methodology to the findings, conclusions and recommendations.

### **1.7.3. Scope of the study**

This part of research methodology covers the scope of this study. The intention of this part is to show the contextual limitation of this study and the extent to which the researcher was limited during data collection. The coverage of the scope for the purpose of this study is as follows;

The area of the study is limited to the jurisdiction of the ICC on the crime of aggression and the role played by the UN Security Council when determining the ICC's jurisdiction on aggression. Basing on this limitation, the study analyses the interplay between the UN Security Council and the ICC on the crime of aggression.

To achieve this, the researcher has made reference to various international instruments particularly those which confer special powers to the UN Security Council and the ICC on the crime of aggression. These major instruments are UN Charter and the Rome Statute, 1998 as well as the resolution RC/Res 6, 2010 which resolves important issues with regard to the jurisdiction over aggression.

The major units studied and concentrated on by the researcher in this study were mainly international organs and the crime. The unit of international organs comprises an organ of the UN i.e. UN Security Council and the ICC while the unit of the crime is covered by the crime of aggression. For the purpose of this study, the two components of the unit of international organs studied by the researcher are integrated by the unit of the crime of aggression.

The geographical area of this study is within Tanzania. The researcher gathered information relating to this study particularly from the regions of Dar es Salaam, Dodoma and Morogoro. These regions were highly favoured by the researcher due to the availability legal experts of international law and reputable higher learning institutions like the University of Dar es Salaam, Mzumbe University in Morogoro and the University of Dodoma. Apart from the availability of International law scholars, the above higher learning institutions are also very rich in documentary resources particularly those which relate to this study. Hence, it was important for the researcher to utilise these potential resources available in these regions of Dar es Salaam, Dodoma and Morogoro.

The period upon which this study was conducted is eight months beginning from January 2016 to August 31, 2016.

## **1.7.4 Population and Sampling Design**

### **1.7.4.1 Population**

The researcher focused on persons belonging to the legal profession for the purposes of enquiring information relating to this study. Due to the nature of this study, the researcher's population covered only lawyers who have specialised in international law. This population was further divided into four sub populations. These are international law lecturers, international law students, Lawyers with specialisation of international law at the Ministry of Foreign Affairs and International Cooperation and the office of the Attorney General in Tanzania and advocates with specialisation of international law at private law firms in Tanzania.

Therefore, the target of the researcher was the lecturers with specialisation of international law at the departments of international law in the above stated Universities as well as international law students with the minimum level of masters degree. The researcher had to seek information from other experts of international law who are not attached to the above universities but to other public and private offices within the regions specified in the area of study.

It was not possible to obtain information from all individuals belonging to each of the above sub group. Therefore, the researcher selected some individuals from each group for the purpose of collecting the intended data. Their specific numbers can be seen below on chosen samples.

### **1.7.4.2 Sampling Design**

The researcher applied a purposive sampling method for the purpose of this study. This sampling technique applied by the researcher, reflects informational demand of this study which by its nature requires information from persons with international legal knowledge. Therefore, the researcher had a sample selection of lawyers with specialisation of international law.

The researcher's sample size comprised thirty one (31) individuals from the government institutions, higher learning institutions and law firms. This sample size was divided as follows;

- i. International law Lecturers from higher learning institutions in Tanzania (7)
- ii. International law Students from higher learning institutions in Tanzania (12)
- iii. Ministry of Foreign Affairs and International Cooperation-Tanzania (3)
- iv. The office of the Attorney General-Tanzania (4)
- v. Law firms (5)

Each category of respondents specified above has specific roles and importance to this study. Generally, the whole population reflects informational demand of this study and the nature of the study. Their role on international criminal law necessitated the researcher to consult them in order to obtain the required information. The higher learning institutions were very useful to the researcher since they are centres of academic researchers and consist of qualified experts of international criminal law and postgraduate students in the relevant field. International law lecturers and students in the chosen higher learning institution provided useful and detailed information in response to the questions posed to each of them.

The office of the Attorney general and Ministry of Foreign Affairs and International Cooperation in Tanzania form part of the executive branch of the state. The executive branch of the government is highly involved during negotiations and signing of international treaties and conventions. The Ministry of Foreign Affairs and the office of the Attorney General are also highly involved during the negotiation and signing process, hence their views on the research problem of this dissertation were very important since their officers are involved in the practical making and signing of international conventions. The law firms are equally important to this study as they consist of practicing advocates who have specialised in international law.

### **1.7.5 Data collection methods and instruments.**

For the purpose of this study, the researcher used three methods of data collection. These methods are interview, questionnaire and documentary review. These first two methods enabled the researcher to obtain primary information from the respondents specified above while the third method facilitated secondary information with regard to the problem of this research

Interview is a verbal technic of data collection which may be structured or unstructured.<sup>67</sup> It involves a direct conversation between an interviewer and the interviewee. Through interview method, the researcher had a direct conversation with the some of the respondents. The researcher had also an opportunity to ask various questions regarding jurisdictional complications of the ICC over the crime of aggression and obtained different comments on the future of the crime of aggression due to the nature of the UN Security Council and its resolutions. This method was chosen by the researcher due to its advantages particularly saving time and obtaining fresh and even more than intended information from the respondent.

Difficulties of having a direct interview with every respondent necessitated the researcher to apply the questionnaire method. Since the questionnaire method is less expensive than interview, the researcher distributed questionnaires to all other respondents who were not directly interviewed. This method facilitated collection of more data particularly to students and international law experts from law firms compared to interview method. However, there was a problem of non-replying to some of the questionnaires by the respondents. Nevertheless, the researcher managed to obtain most of the required information for the purpose of this study.

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<sup>67</sup>Vibhute K. and Aynalem (2009) Legal Research Methods. p. 90

### **1.7.6 Data analysis**

The researcher applied qualitative data analysis when analysing the information obtained after data collection. Qualitative data analysis was also applied when testing the hypothesis and drawing conclusions regarding the findings. Through qualitative data analysis, the researcher was able to link the hypothesis and the information obtained through documentary review, interview and questionnaire methods. The conclusions were made on the basis of the results obtained after testing the hypothesis.

### **1.7.7 Limitations of the study**

Just like various other studies, this study also had limitations. The study being based on the area of international law, it was important to obtain primary information from individuals with special knowledge of international law only. There is still low number of lawyers with specialisation of international law in Tanzania. This led to small number of respondents particularly lawyers at the private and public sectors. Despite the availability of few respondents on this study, there were still delays and unwillingness of other individuals to cooperate with the researcher.

Shortage of fund which was required by the researcher to accomplish this study in time and as intended by the researcher is another limitation of this study. The study was conducted in three different regions of Dar es Salaam, Dodoma and Morogoro. Direct contact with respondents in these areas and making follow ups of questionnaires require enough fund. Shortage of enough fund caused delays of the process.

Despite these limitations, the researcher was able to collect enough data which was necessary for the accomplishment of this work.

## **1.8 Conclusion**

The content of this chapter forms the basis of this dissertation. Important matters and technical issues relating to this study have been explained here. These include, background of the research, statement of the problem, objectives of the study, research hypothesis and methodology. With these important issues, this chapter has clearly stated the problem of this study, the hypothesis, the design and the manner in which the data has been obtained and analysed for the purpose of testing hypothesis and drawing conclusions regarding this study.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK

#### 2.0 Introduction

This chapter is on the conceptual framework regarding aggression and the institutions dealing with it under international law. Generally, the chapter aims at providing a general understanding of various terms and concepts used in this study as well as institutions and certain persons. The aim for explaining these persons, organs and institutions relevant to the crime of aggression is due to their significant role in the investigation, arrest, prosecution and adjudication of the perpetrators of the crime of aggression. At the end, this chapter will show how the UN Charter is related to the ICC Statute on aggression.

#### 2.1 Definition of terms

##### 2.1.1 A crime

Various dictionaries define the term crime to the extent that, it is an act or omission prohibited by law and punishable under the law.<sup>68</sup> Crime has also been defined by various authors of criminal law books. Among them is William Musyoka who defines the term crime as any act or omission prohibited by the law that is enacted for the protection of the public and the violation of which is prosecuted by the state in judicial proceeding in its own name.<sup>69</sup> This definition seems to be limited to crimes committed under municipal penal laws which are prosecuted by the state. The author's limited definition may be due to the context of his book which is generally based on criminal law at the national level.

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<sup>68</sup> These include, Garner, B. A. (Ed.). (2004). *Black's law dictionary*. 8<sup>th</sup> edition, USA, West publishing Co., Martin E., (Ed.). (2003) *Oxford Dictionary of Law*, Fifth Edition, Oxford University Press, New York. Woodley, M., (Ed.). (2005) *Osborn's Concise Law Dictionary*, Tenth Edition, Sweet and Maxwell, London.

<sup>69</sup> Musyoka W, (2013) *Criminal Law*, lawAfrica, Nairobi. pp. 4 and 5

Generally, the above definitions agree on the illegality nature of the term crime under the law. Thus, there should be a law which declares a certain act or omission illegal before a person is accused of a crime. Domestic laws of various states have regulated a number of conducts and omissions as crimes punishable under the laws. However, the illegality of these conducts may differ from one jurisdiction to another. For example, Adultery or the use of certain drugs may be a crime in one jurisdiction but not a crime in the other Jurisdiction. Despite this practice, there are certain acts which are condemned by all societies and their commission constitutes crimes in all states.

### **2.1.2 International crime**

The Black's law dictionary defines international crime as a grave breach of international law such as genocide and crimes against humanity, made punishable offences by treaties and applicable rules of customary international law. Black's law dictionary also defines a crime against the law of nations or a crime against international law, as a crime punishable under internationally prescribed criminal law or defined by an international convention and required to be made punishable under criminal law of the member states, or an act that is internationally agreed to be of criminal nature such as genocide, piracy or engaging in slave trade.<sup>70</sup>

Claire de Than and Edwin Shorts have also defined an international crime as an act which the international community recognises as not only a violation of ordinary State criminal law but one which is so serious that it must be regarded as a matter for international concern.<sup>71</sup> This definition covers a large scope of acts recognised as crimes by the international community. These include piracy, slavery, torture, terrorism, drug trafficking, genocide, crimes against humanity, war crimes and the crime of aggression.

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<sup>70</sup> Black's Law Dictionary. *Op. Cit.*

<sup>71</sup>Than, C. and Shorts, E. (2003) International Criminal Law and Human Rights, Sweet & Maxwell. London. p. 13.

However the above general definition of international crime has been narrowed by other authors to include only those crimes which can be prosecuted in an International criminal tribunal whether permanent or *ad hoc*.<sup>72</sup> For instance, Cryer, R. *et al*, have used the term international crime to refer to those offences over which international courts or tribunals have been given jurisdiction under general international law.<sup>73</sup> This definition includes only those crimes like genocide, war crimes and crimes against humanity which are currently under the jurisdiction of international criminal tribunals and courts. It seems excludes some of the oldest crimes with the most accepted status like piracy.<sup>74</sup>

International crimes have their origin from international conventions and rules of customary international law.<sup>75</sup> As a response to grave atrocities and violation of human rights, the international community, in addition to condemnation of these atrocities, has entered into various international treaties and developed various international customs to bind states against the commission of the atrocities. Thus, all International crimes existing today have originated from customary international law and international conventions to address the clear intention of the world community towards eradicating these grave atrocities and violation of human rights.

### **2.1.3 Aggression**

Due to a long debate over what constitutes aggression for the purpose of international law, various dictionaries of law referred to by the researcher have not created a clear definition of the term aggression. The authors or editors of these dictionaries still use the wording of the UN General Assembly Resolution 3314 (XXIX) of 1974 which defined an act of aggression as 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 ...<sup>76</sup>

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<sup>72</sup> Ibid.

<sup>73</sup> Cryer R. *et al.*, *Op. Cit.* p. 4.

<sup>74</sup> Than, C. and Shorts, E. *Op. Cit.*

<sup>75</sup> Ibid.

<sup>76</sup> Black's Law Dictionary. *Op. Cit.*

The definition of Aggression by the General Assembly Resolution 3314 (XXIX) which is reflected in the Black's law dictionary caters for an act of aggression only and not the crime itself. The current position on the definition of an act of aggression can be reflected in the 2010 Resolution RC/Res.6 for the amendment of the Rome Statute. Article 8(2) *bis* of the Resolution recognises the definition of the act of aggression provided in the General Assembly Resolution 3314 (XXIX). The effect of this provision is to continue applying the definition of the act of aggression which was adopted by the UN General Assembly in 1974 for the purpose of determining the crime of aggression.

Furthermore, the third element of the crime of aggression stipulated under Annex II of the Resolution requires an act of aggression to have been committed.<sup>77</sup> The wording of an act of aggression constructed in the third element of the crime are similar to the words used in defining aggression under the General Assembly Resolution 3314 (XXIX). Thus if the Resolution RC/Res.6 will be officially adopted in January 2017, then the definition of the act of aggression will have a strong base.

#### **2.1.4 Crime against peace and the Crime of Aggression**

The Black's law dictionary defines the Crime against peace as an international crime in which the offenders plan, prepare, initiate, or wage a war of aggression or a war in violation of international peace, treaties, agreements or assurances.<sup>78</sup> This definition originates from article 6(a) of the London Charter, 1945. The definition of the Crime of aggression under the London Charter was also similar to that provided under article 5(a) of the Charter of the International Military Tribunal for the Far East, 1946.

Among other things, the definition of the Crime against peace under the above Charters was to enable the Nuremburg and Tokyo Tribunals to exercise their jurisdiction over the crime in a just manner.<sup>79</sup>

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<sup>77</sup> See Annex II of the Resolution RC/Res.6 on Amendments to the Elements of Crimes. (Article 8 *bis*)

<sup>78</sup> Black's Law Dictionary. *Op. Cit.*

<sup>79</sup> More about the definition of the crime of aggression under the London Charter will be dealt in detail in Chapter Three of this Report.

Indeed there is no difference between the crime against peace and aggression. Aggression as a crime emerged from the crime against peace in the Nuremburg and Tokyo Tribunals for the purpose of proceeding against those who were perpetrators of aggressive war. The definition of the crime of aggression was limited to the jurisdiction of the Nuremburg and Tokyo Tribunals only. After the two tribunals had completed their task, it became difficult for states to reach an agreement on the definition of the crime of aggression and what constitutes the crime.<sup>80</sup> By the time the Rome Statute was adopted in 1998, the agreement on the definition of the crime of aggression was not reached, hence the ICC lacked jurisdiction on the crime. However in 2010 the Rome Conference by consensus adopted a Resolution RC/Res.6 in which the crime of aggression was defined to mean,

*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.*

This definition will be officially agreed when member states will agree to be bound by it in January 2017.

## **2.2 Organs, Institutions and Persons conferred with specific powers over aggression**

### **2.2.1 The United Nations**

The United Nations (UN) is the intergovernmental organisation for maintaining international peace and security, promoting international cooperation, human rights as well as social progress and better standards of life in larger freedom.<sup>81</sup> The UN was established and is regulated by the Charter of the United Nations. The UN Charter was

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<sup>80</sup> A detailed overview on how the definition of the crime of aggression was reached is discussed in Chapter Three of this Report.

<sup>81</sup> This definition is based on the preamble of the Charter of the United Nations, 1945.

signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation and came into force on 24 October 1945.<sup>82</sup>

Among the aims for the establishment of the UN in 1945 which have a link to aggression are based on saving succeeding generations from the scourge of war, practicing tolerance among states and live together in peace with one another as good neighbours and maintaining world peace and security.<sup>83</sup>

Furthermore, article 1(1) of the UN Charter is of direct relevancy to aggression. The article provides for the purpose of the UN in maintaining international peace and security by taking effective collective measures for the prevention and removal of threats to the peace, suppression of acts of aggression or other breaches of the peace. Thus, the UN is one of the organisations which have been conferred powers over aggression, hence has a role to play on issues of aggression.

### **2.2.2 The United Nations Security Council.**

The UN Security Council is one of the organs of the UN which are established under article 7(1) of the UN Charter. Thus, it is an organ within the UN and it forms part of the UN. Being an organ of the UN, the Council is established, conferred powers and generally regulated by the UN Charter itself.

The composition of the UN Security Council is fifteen members of the UN, five of whom become permanent members of the Council.<sup>84</sup>

Through the UN Charter, member states of the UN have conferred on the Security Council a primary responsibility for the maintenance of international peace and security and agree that, the Security Council acts on their behalf when carrying out this primary responsibility.<sup>85</sup> Further, the UN Charter directs the Council to comply

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<sup>82</sup>The first paragraph of the introductory note of the UN Charter.

<sup>83</sup>The preamble to the UN Charter.

<sup>84</sup> Article 23 of the UN Charter provides for the composition of the Security Council. According to this provision, the five permanent members of the Security Council are; The Republic of China, France, Russia, The United Kingdom of Great Britain and Northern Ireland and the United States.

<sup>85</sup>Article 24(1).

with the purposes and principles of the Charter when discharging this primary function.<sup>86</sup> Therefore, the Council's primary duty regarding aggression is to maintain international peace and security through suppression of acts of aggression or other breaches of the peace.<sup>87</sup>

For the purpose of putting into effect the provisions conferring powers to the UN Security Council, the UN Charter confers onto it the power of making recommendations or deciding what measures will be taken against the state which has threatened international peace and security.<sup>88</sup> The measures which can be taken include complete or partial interruption of economic relations, the means of communication and the severance of diplomatic relations.<sup>89</sup> If these measures are considered inadequate by the Security Council it may use force as may be necessary to maintain or restore international peace and security.<sup>90</sup>

### **2.2.3 The International Criminal Court. (The ICC)**

The International Criminal Court is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>91</sup> The ICC has jurisdiction to try these offences with the exception of the crime of aggression whose jurisdiction will be confirmed in January 2017 depending on the agreement of states parties.

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<sup>86</sup>Ibid. Article 24(2).

<sup>87</sup> Ibid. Article 24(1) (2) read together with article 1(1).

<sup>88</sup> Ibid. Article 39.

<sup>89</sup> Ibid. Article 41.

<sup>90</sup> Ibid. Article 42.

<sup>91</sup>Understanding the International Criminal Court.A booklet by the International Criminal Court.p. 3.Retrieved May 25, 2016 from the World Wide Web: <https://www.icc-cpi.int/resource-library/Documents/UICCEng.pdf>

The ICC was established on 17 July, 1998 after the adoption of the Rome Statute of the International Criminal Court.<sup>92</sup> It is a permanent court and an independent organ with international legal personality.<sup>93</sup> It has been conferred jurisdiction by the Rome Statute and it functions under the rules of the same statute.<sup>94</sup> The official buildings of the court are situated at The Hague in the Netherlands.<sup>95</sup>

ICC's establishment came after the world had witnessed grave violation of human rights and various atrocities committed at different times and in different places around the world. Further, while adopting the Rome Statute in 1998, States parties acknowledged the existence of millions of children, men and women who have been the victims of unimaginable atrocities that deeply shock the conscious of humanity and agreed that, such grave crimes threatened the peace, security and well-being of the world.<sup>96</sup> Furthermore, before its establishment various tribunals had already been established by certain treaties and others under the umbrella of the UN Security Council in response to those grave atrocities.<sup>97</sup>

Thus, the ICC was established with a view of prosecuting these most serious crimes at international level for the purpose of ensuring the perpetrators of these atrocities are punished.<sup>98</sup> The prosecution at the ICC should therefore be distinguished from those of the tribunals which pre-existed the ICC in the sense that, the ad hoc tribunal's and special court's jurisdictions were limited to specific crimes committed in the specific areas while the ICC's jurisdiction has a wider coverage.<sup>99</sup>

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<sup>92</sup>Ibid.

<sup>93</sup>Ibid. Also articles 1 and 4 (1) of the Rome Statute, 1998.

<sup>94</sup>Article 1 of the Rome Statute, 1998.

<sup>95</sup> This is due to the requirement of article 3(1) of the Rome Statute that, the seat of the court be established at The Hague in the Netherlands.

<sup>96</sup> See the Preamble to the Rome Statute, 1998.

<sup>97</sup> These tribunals include the Nuremburg Tribunal and Tokyo Tribunal which were established by their respective Charters as well as the ICTY and ICTR which were established under the umbrella of the UN Security Council.

<sup>98</sup>The preamble of the Rome Statute, 1998.

<sup>99</sup>Understanding the International Criminal Court. A booklet by the International Criminal Court. Op.Cit.p. 5.

#### **2.2.4 The prosecutor of the International Criminal Court.**

The black's dictionary defines the prosecutor as a legal officer who represents the State or Federal government in criminal proceedings.<sup>100</sup> This definition satisfies the concept of a prosecutor at the domestic level. This is due to the reference of the prosecutor as a representative of the State in criminal proceedings. Thus, it does not cover the situations where the prosecutor represents an international entity or acts on its behalf in criminal proceedings. The prosecutor of the ICC is a good example of the prosecutors acting for an international organ hence it is important to have a wider concept of the term.

Although the Rome Statute confers specific powers to prosecutor of the ICC, it does not provide the meaning of the term. Regulation 2 of the Regulations of the Office of the Prosecutor only shows that, the term prosecutor is used to refer to the prosecutor of the ICC.<sup>101</sup> However, in the light of the powers conferred to the prosecutor over the crimes within the jurisdiction of the court, the jurisdiction of the prosecutor of the ICC occupies a wider coverage in line with the court itself as compared to prosecutors at domestic level.<sup>102</sup> Thus, the prosecutor of the ICC acts for the ICC in all international crimes within the jurisdiction of the court and has powers to investigate commission of these crimes, arrest the perpetrators and prosecute them in accordance with the Rome Statute.

The prosecutor of the ICC acting in his office plays a great role in ensuring the perpetrators of grave offences within the jurisdiction of the ICC do not go unpunished. In one way or another, the office of the prosecutor contributes greatly to the fulfillment of the objectives which necessitated the establishment of the ICC. Currently the ICC prosecutor cannot exercise his powers of investigation, arrest and prosecution over the crime of aggression due to lack of jurisdiction.

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<sup>100</sup>The black's law dictionary. Op. Cit.

<sup>101</sup> These Regulations entered into force on 23<sup>rd</sup> April 2009.

<sup>102</sup> The powers of the prosecutor of the ICC are specifically stated under article 15 of the Rome Statute, 1998.

However, if the ICC's jurisdiction over the crime of aggression will be triggered in January 2017, the prosecutor will also exercise his full powers over the crime.

### **2.3 Conclusion**

This chapter has defined terms and explained key concepts used in this study. These few terms relate to crimes generally and the crime of aggression in particular. It was also important for this chapter to show and explain institutions, organs and persons with special powers over aggression generally. This chapter was only aimed at showing the conceptual framework of these institutions and persons. Their detailed legal framework in connection with aggression is discussed in the next chapter of this dissertation. Thus, in respect of this chapter, it was important to understand various terms, concepts and organs used in this study.

## **CHAPTER THREE**

### **INTERNATIONAL LEGAL FRAMEWORK FOR AGGRESSION**

#### **3.0 Introduction**

This work has clearly discussed the history and development of the crime of aggression under chapter one. This chapter is on the legal framework of an act of aggression under international law, particularly in the context of the UN and the crime of aggression in the context of the ICC. The chapter discusses the nature of acts of aggression under international law as well as the powers of the UN Security Council over the crime of aggression under the UN Charter and the jurisdiction of the ICC over the Crime of aggression under the Rome Statute. The aim is to analyse the roles of both the UN Security Council and the ICC under international law generally.

#### **3.1 An Act of Aggression**

An act of aggression is distinguished from the crime of aggression in the sense that, it engages the responsibility of states for the act.<sup>103</sup> This distinction implies the existence of two different systems dealing with aggression under international law. This part discusses the act of aggression as it has been dealt under international law and the UN organs. The major aim of this part is to provide a general understanding of an act of aggression in terms of its nature and the legal frame work.

##### **3.1.1 An act of aggression under international law**

Recourse to war as a means of resolving international controversies have been condemned over years. Signatories of the Kellogg - Briand Pact had a clear intention of renouncing the use of war as a means of resolving disputes arising among themselves.<sup>104</sup> Instead the parties opted for the peaceful settlement of disputes among them.<sup>105</sup> The pact was initially signed by German, France and United States on August

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<sup>103</sup>Cryer. Op. Cit. p. 315

<sup>104</sup> The Kellogg - Briand Pact, Op. Cit. Article I

<sup>105</sup> Ibid, article II

27, 1928 but soon thereafter most states signed the document.<sup>106</sup> In other words, by signing the Kellogg-Briand Pact, states agreed to renounce the use of war in resolving their disputes or conflicts. States also agreed to the consequence of being denied the benefits furnished by the Pact in situations of failure to observe the rule requiring them to renounce recourse to war.<sup>107</sup>

Condemnation of acts of aggression under the Kellogg - Briand Pact, 1928 is now the basis for regarding aggression as an illegal act under international law. Indeed it is an illegal act which has been condemned by states and forbidden under customary international law.<sup>108</sup> When the defense objected the existence of aggression the Nuremburg Tribunal ruled that, "*the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law...*"<sup>109</sup> However, the intention of the Kellogg-Briand Pact was to hold states responsible for acts of aggression.

Customary international law is well recognised as one of the sources of international law under article 38 (1) (b) of the statute of the International Court of Justice. It does not only require generality of the practice among nations, but also its acceptance as a binding law among them. Therefore, the ongoing condemnation of acts of aggression and prior acceptance of most states to be bound by the Kellogg-Briand Pact, 1928 express the illegality of an aggressive war under customary international law.

### **3.1.2 Aggression under the UN Charter.**

Among the purposes of the UN on maintenance of international peace and security stated under article 1 (1) of the UN Charter, is on suppression of acts of aggression or other breaches of the peace and settlement of international disputes by peaceful means. Moreover, article 2(4) of the UN Charter requires member states to refrain in their international relations from the threat or use of force against the territorial integrity or

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<sup>106</sup>[https://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand\\_Pact](https://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand_Pact)

<sup>107</sup>Kellogg-Briand Pact.

<sup>108</sup>Cryer.Op. Cit. p. 312.

<sup>109</sup>Ibid, p. 313.

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) above clearly forbids member states from engaging into threats or the use of force by one state against another state since the acts are inconsistent with the purposes of the UN. Among the purposes of international law is the suppression of acts of aggression. Therefore, among other things, article 2(4) of the Charter is aimed at suppressing acts of aggression by forbidding member states from engaging into the use of force against one another. With the inclusion of these two articles in the UN Charter, acts of aggression are now widely prohibited under customary international law.

### **3.1.3 The definition of an act of aggression under the UN General Assembly Resolution 3314 (XXIX)**

In 1974, the UN General Assembly adopted a resolution 3314 (XXIX) defining an act of aggression. Among other things, the adopted resolution on the definition of aggression was intended to work as guidance to the UN Security Council on its role of determining the existence of acts of aggression in accordance with the UN Charter.<sup>110</sup> The UN General Assembly was also convinced that, the adoption of the definition of aggression would have effect in deterring the potential aggressor and simplify the determination of acts of aggression and the implementation of measures to suppress them.<sup>111</sup>

Article 1 of the text defines aggression as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.<sup>112</sup> Article 2 makes it clear that, the first use of armed force by a State in

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<sup>110</sup> Paragraph 4 of the Resolution, 3314 (XXIX)

<sup>111</sup> Preamble of the text defining aggression annexed to the UN General Assembly Resolution 3314 (XXIX)

<sup>112</sup> The text defining aggression annexed to the UN General Assembly Resolution 3314 (XXIX)

contravention of the Charter shall constitute prima facie evidence of an act of aggression.<sup>113</sup>

Article 3 of the text provides for acts which when exist, they constitute an act of aggression regardless of a prior declaration of war.<sup>114</sup> However these elements should be subject to the provision of article 2 of this text. These acts are;

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

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

One of the issues discussed by the ICJ in the Nicaragua Case was the principle prohibiting recourse to the threat of use of force in international relations.<sup>115</sup> At paragraph 195 of its judgement, the ICJ stated that,

*... it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State ...*<sup>116</sup>

From the above quoted paragraph, it can be seen how international prohibition of acts of aggression forms part of customary international law. Nicaragua Case demonstrates the position of the ICJ as the judicial organ of the UN on the customary nature of the UN General Assembly Resolution 3314 (XXIX). Of importance also, the ICJ went on interpreting article 3 (g) of the text defining aggression in the following words,

*... The Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a*

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<sup>115</sup> Military and Paramilitary Activities in and against Nicaragua (**Nicaragua Vs United States of America**) Merits, Judgement, ICJ Reports, 1986, p. 14

<sup>116</sup> **Nicaragua Vs United States of America**. Op. Cit.

*threat or use of force, or amount to intervention in the internal or external affairs of other States ...*<sup>117</sup>

Indeed the UN General Assembly simplified the task of determining acts of aggression by the relevant organs. The General Assembly Resolution 3314(XXIX) laid a solid foundation for the determination of acts constituting an act of aggression and the future consideration of the crime of aggression.

### **3.1.4 Determination of the existence of aggression**

In chapter two of this report, the researcher has explained generally on what the UN Security Council is, its composition and functions. This part focuses on the role of the UN Security Council on aggression. The aim is to show how the UN through the UN Security Council responds to acts of aggression under the UN Charter.

Among the powers granted to the UN Security Council by the Charter in order to fulfill its primary responsibility for the maintenance of international peace and security, is its role in the determination of acts of aggression for the purposes of carrying out effective measures under chapter VII of the UN Charter. Among other things, article 39 of the UN Charter authorises the Security Council to determine the existence of acts of aggression and make recommendations or decide what measures to be taken in accordance with Articles 41 and 42 in order to maintain or restore international peace and security.

Determination of acts of aggression is one of the substantive matters in the UN Security Council whose decision requires an affirmative vote of nine members including the concurring votes of the permanent members of the Security Council.<sup>118</sup> Thus, a negative vote or abstention by any of the permanent members of the Council has a negative implication to the determination of any potential act of aggression by the Security Council.

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<sup>117</sup> Ibid.

<sup>118</sup> Article 27(3) of the UN Charter.

Therefore, the role of the UN Security Council on determination of acts of aggression is clearly provided by the UN Charter. Although the Charter does not expressly confer exclusive powers on determination of the existence of acts of aggression to the Security Council, but it is generally understood that, the Security Council has a primary role on determining the existence of acts of aggression and this role is essential for effective carrying out of the purposes of the UN.

### **3.2 The crime of aggression**

The second part to this chapter discusses aggression as an offence whose commission engages individual criminal responsibility as opposed to an act of aggression which engages state responsibility. Unlike other international crimes under the Rome Statute, the crime of aggression is connected with unlawful act of the state making the participating state leaders and policy makers responsible for aggressive acts by the state.<sup>119</sup> The aim of this part is to provide the legal framework of the crime of aggression by looking into its nature, definition and elements under international law. Further, this part discusses the jurisdiction of the ICC over the crime of aggression according to the amending text of the Rome Statute which was adopted through a Resolution RC/Res. 6 in Kampala.

#### **3.2.1 The Nuremburg International Military Tribunal on Crimes against peace**

Prior to the London Charter which established the Nuremburg Tribunal, there was the Moscow Declaration of 1943.<sup>120</sup> Following the grave atrocities committed during the Second World War which left untold sorrow to mankind, the governments of the United Kingdom, United States and the Soviet Union jointly declared in Moscow that, the German officers and men and members of the Nazi party who have taken part in the atrocities, massacres and executions in the countries overrun by German forces, should be held responsible for these grave acts and punished according to the law.<sup>121</sup>

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<sup>119</sup> Cryer. Op. Cit. p. 312.

<sup>120</sup> The Moscow Declaration (Declaration on German Atrocities) dated 30 October, 1943.

<sup>121</sup> Memorandum submitted by the Secretary General to the United Nations General Assembly and the International Law Commission (1949). *The Charter and Judgement of the Nuremburg Tribunal; History and Analysis*. Lake Success, New York. p. 3.

With this declaration, the three governments condemned such grave atrocities and showed their intention to have the perpetrators of these grave acts punished severely for their conducts.

The London Agreement was signed by the Governments United Kingdom, France, United States and the Soviet Union on August 8, 1945. Among other things, the agreement provided for the establishment of International Military Tribunal for the trial of war criminals whose offences have no particular geographical location.<sup>122</sup> It is on this foundation that the Nuremburg International Military Tribunal was created for the trial of war criminals of the European Axis countries whether accused individually or in their capacity as members of the organisation or groups.<sup>123</sup>

Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement, 1945, provides for individual criminal responsibility for the crimes against peace, war crimes and crimes against humanity which are within the jurisdiction of the Tribunal. Article 6(a) of the Charter defines Crimes against peace as planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The powers conferred to the Nuremburg Tribunal over individual criminal responsibility and the definition of crimes against peace formed the basis of the jurisdiction of the Tribunal and easy determination of the crimes against peace and other crimes under article 6 of the Nuremburg Charter.

During the trials at the Nuremburg Tribunal, among the objections raised by the defense are that, only states are subjects of the law of nations and nor individuals.<sup>124</sup> It was argued that, to punish individuals for their decision regarding war and peace would be to destroy the notion of a state.<sup>125</sup> On this issue the Tribunal ruled that, "*Crimes against international law are committed by men, not by abstract entities, and*

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<sup>122</sup>Article 1 of the London Charter, 1945.

<sup>123</sup> Ibid.

<sup>124</sup>*The Charter and Judgement of the Nuremburg Tribunal; History and Analysis*.Op.Cit.p. 39.

<sup>125</sup>Ibid, p. 40.

*only by punishing individuals who commit such crimes can the provisions of international law be enforced.*"<sup>126</sup> The tribunal therefore affirmed that, individuals can be punished for violations of international law and continued

The defense also maintained that, the provision making resort to aggressive war an international crime constituted an *ex post facto* law, hence conflicting with the principles, *nullum crimen sine lege* and *nulla poena sine lege*. The defense submitted that,

*"..ex post facto punishment is abhorrent to the law of all civilized nations that no sovereign Power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.*"<sup>127</sup>

However, the tribunal did not agree with the defense on this objection. When dismissing the objection, the Tribunal relied on the Kellogg - Briand Pact, 1928 and proved that, at the outbreak of the war, recourse to aggressive war was an international crime. The tribunal emphasised this point by explaining the legal effect of the Kellogg - Briand Pact as follows;

*The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies*

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<sup>126</sup>Ibid, p. 41.

<sup>127</sup> Ibid, p. 43

*undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.*

Following the judgement of the Nuremburg Tribunal on crimes against peace and the application of the same reasoning in the Tokyo International Military Tribunal, it is generally accepted that, there is now a crime of aggression under customary international law.<sup>128</sup> The status of the crime of aggression under customary international law made the signatories of the Rome Statute to adopt and include the crime of aggression in the list of international crimes under the Rome Statute although initially they did not agree on the definition and jurisdiction of the crime.<sup>129</sup>

### **3.2.2 The crime of aggression under the Resolution RC/Res.6 of 2010.**

The crime of aggression was one of the four international crimes which were included in the Rome Statute.<sup>130</sup> Unlike other offences, the crime of aggression remained hanging in the list of four international crimes without being defined and addressed under the jurisdiction of the ICC.<sup>131</sup> This is due to disagreement among member states on definition and the draft terms of jurisdiction over the crime of aggression. Members' disagreement on jurisdiction was mainly directed to the role of the UN Security Council over the crime of aggression.<sup>132</sup>

According to Robert Cryer *et al.* article 5 (2) of the ICC Statute was inserted at a very late stage of the conference; it reflects the impossibility of reaching agreement on the details but also the firm insistence of the majority at the conference that the crime somehow be included in the statute.

Consensus on the definition and jurisdiction over the crime of aggression was reached on June 11, 2010 when a Resolution RC/Res. 6 was adopted in Kampala for the purpose of amending the Rome Statute on the crime of aggression.

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<sup>128</sup>Cryer. Op. Cit. p. 314

<sup>129</sup>Article 5 of the Rome Statute.

<sup>130</sup>International crimes are contained under article 5(1) of the Rome Statute, 1998. These are Genocide, Crimes against humanity, War crime and the Crime of aggression.

<sup>131</sup>Article 5(2) of the Rome Statute.

<sup>132</sup>Cryer. Op. Cit. p. 316

Although the jurisdiction of the ICC on the crime of aggression is not yet activated, the definition and jurisdiction over the crime of aggression according to the Resolution RC/Res. 6 is very important for analysing the legal framework of the crime of aggression.

Article 8 (1) *bis* of the Resolution RC/Res. 6, 2010 defines the crime of aggression as, the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. Article 8 (2) *bis* distinguishes an act of aggression from the crime of aggression by defining an act in accordance with articles 1 and 3 of the text annexed to the Resolution 3314 of the UN General Assembly which is found under part 3.1.3 of this chapter.

Observing the wording of article 8 (1) *bis* of the Resolution RC/Res. 6, 2010 and the wording of article 6(a) of the Nuremburg Charter, 1945, one can conclude that, consensus was reached in the light of the Nuremburg tribunal's Charter and judgements. The constituting elements of an act of aggression under article 8 (2) *bis* of the Resolution RC/Res. 6, 2010 are intended to assist in the determination of the existence of acts of aggression for the purpose of proceeding with the crime of aggression.

The 2010 proposed amendments to the Rome Statute maintains that, the acts under article 8 (2) *bis* qualify as an act of aggression. Hence, there is no requirement to prove that, the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the UN Charter. What the ICC shall do when its jurisdiction over the crime of aggression is activated, is to concentrate on whether the perpetrator is criminally responsible for aggression. To archive this easily, article 8*bis* guides the court with the following elements;

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

Together with the above definition of the crime of aggression, a Resolution RC/Res. 6, 2010 also provides for the jurisdiction of the ICC over the crime of aggression. Generally, the ICC jurisdiction over the crime of aggression shall be activated subject to the decision to be taken on January 1, 2017 by thirty member states of the Rome Statute.<sup>133</sup> It is also provided that, the ICC shall exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty State Parties.<sup>134</sup>

Just like other offences within the jurisdiction of the ICC, article 13 of the Rome Statute applies also to aggression when its jurisdiction will be activated.<sup>135</sup> That is to say, an alleged crime of aggression can be referred to the prosecutor by a state party for investigations to be initiated.<sup>136</sup> The prosecutor of the ICC on his own motion can

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<sup>133</sup>Article 15 (3) *bis* and article 15 (3) *ter* of the Resolution RC/Res 6, 2010.

<sup>134</sup> *Ibid*, article 15 (2) *bis* and article 15 (2) *ter*.

<sup>135</sup> *Ibid*, articles 15 (1) *bis* and 15 (1) *ter*.

<sup>136</sup> Article 13 (a) read together with article 14 of the Rome Statute.

initiate investigations *proprio motu* over the alleged crime of aggression.<sup>137</sup> In certain situations, the UN Security Council, acting under Chapter VII of the UN Charter can also refer the matter to the prosecutor.<sup>138</sup>

### **3.2.3 The interplay between the UN Security Council and the ICC on aggression.**

The UN Security Council and the ICC are linked by jurisdictional requirements before the crime of aggression is prosecuted. This is one of the major differences between the crime of aggression and the rest of the crimes within the jurisdiction of the ICC.

Article 15 (6) *bis* of the Resolution RC/Res. 6, 2010, requires the prosecutor of the ICC to ascertain whether the Security Council has made a determination on the existence of an act of aggression committed by the state concerned before proceeding with investigations on the crime of aggression; whereas paragraph 7 of the same article allows the prosecutor to proceed with investigations on the crime of aggression if the UN Security Council has determined an act of aggression.

The above two paragraphs of article 15 *bis* require prior determination by the Security Council of an act of aggression committed by a state as a pre-condition for the crime of aggression to exist and its perpetrators be subjected to the jurisdiction of the ICC. However, according to article 15 (8) *bis*, this pre-condition can last for six months only from the date a notification by the prosecutor was made to the Secretary General of the UN.<sup>139</sup> The expiry of six months does not give automatic permit for the prosecutor to proceed with investigations.

The Pre-Trial Chamber must first authorise the commencement of investigations, provided that the Security Council has not exercised its deferral powers under article 16 of the Rome Statute.<sup>140</sup>

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<sup>137</sup>Article 13 (c) read together with article 15 of the Rome Statute.

<sup>138</sup>Article 13 (b) of the Rome Statute.

<sup>139</sup>Article 15 (8) *bis* of the Resolution RC/Res 6, 2010.

<sup>140</sup>Ibid.

### **3.3 Conclusion**

This chapter has analysed the legal framework of an act of aggression and the crime of aggression. The aim of discussing the two separately is to show the distinct nature of the crimes, their separate legal framework and regimes governing them. Although they are the two distinct crimes but they appear on the same coin each on its side, one holds state responsibility while the other holds an individual responsible for such act. The above legal analysis reveals that, there should be an act of aggression committed by the state concerned in order for its perpetrators to be prosecuted. This is what international law gives rise to the interplay between the UN Security Council and the ICC over the crime of aggression, whereas the former is concerned with the determination of an act of aggression for the ICC to prosecute the crime of aggression.

## **CHAPTER FOUR**

### **FINDINGS, DISCUSSION AND ANALYSIS**

#### **4.0 Introduction**

This chapter presents the views and opinions of different individuals regarding the problem stated in this study. These views and opinions have been obtained from literally works as well as interview and questionnaire methods. The findings of the researcher from these sources will test each hypothesis raised in chapter one. The researcher has adopted the approach of answering each hypothesis separately by linking the information obtained with the hypothesis.

Therefore, the following parts of this chapter present and analyses the findings of the researcher regarding this study. As stated in the above paragraph, the findings are presented under each hypothesis separately. The intention of the researcher is to show a response of the findings with regard to each hypothesis

#### **4.1. Presentation and analysis of the findings**

##### **4.1.1. Whether the voting system in the UN Security Council on determining acts of aggression will always hinder prosecution of the crime of aggression and the future of the crime itself**

- i. The findings of the researcher from documentary review.

The voting system in the UN Security Council on substantive matters as explained in the above chapter is provided by the UN Charter. Article 27 (1) of the Charter provides the right of every member of the Security Council to have one vote on all decisions of the council regardless of whether the decision is on procedural or substantive matters. Article 27 (3) states clearly that, the decisions of the Security Council on all non-procedural matters shall be made by an affirmative votes of nine members including the concurring votes of the five permanent members.

Among the non-procedural matters to be decided by the UN Security Council through this system is the determination of acts of aggression. In addition, article 27 (3)

requires only a party to a dispute under part VI and article 52 (3) of the UN Charter who is a member of the Security Council to abstain from voting for the relevant decisions of the Security Council. Determination of acts of aggression falls under Chapter VII of the UN Charter, hence even an alleged aggressor state whose matter is before the Security Council can vote for or against the resolution of the Council regarding determination of the existence of an act of aggression.

The veto power of each of the permanent members has been and is still criticised as the major impediment to the achievement of the purpose of the UN on maintenance of international peace and security.

Hans Köchler considers the veto privilege as the major impediment to the achievement of collective security.<sup>141</sup> Köchler shows the concern of various leaders regarding the veto power from the time the UN was formed in 1945. For instance, at the founding conference in San Francisco, the Mexican delegate stated that “*integrating the Yalta voting formula into the UN Charter would establish an international system in which a mouse could be condemned but in which lions would not be restricted.*”<sup>142</sup> The author also shows other examples of the passive reaction of the UN Security Council towards Israel’s conducts and the invasion of Panama by the United States.<sup>143</sup>

It also argues that, the veto power was intentionally incorporated by great nations into the UN Charter as their privilege and for the protection of their interests.<sup>144</sup> Using an example of the U.S, Köchler argues that,

*“The United States, like the other permanent members, apparently considered the veto power as the appropriate institutional safeguard for its interests in the UN at a time*

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<sup>141</sup>Köchler, H. (1991) The Voting Procedure in the United Nations Security Council: Examining a normative contradiction in the UN Charter and its consequences on international relations. p. 7. Retrieved

July17,2016fromtheWorldWideWeb:[http://webcache.googleusercontent.com/search?q=cache:3viNa\\_1KktYJ:www.ipo.org/KoehlerVoting\\_ProcedureUN\\_Security\\_Council.pdf+&cd=7&hl=en&ct=clnk&client=firefox-b](http://webcache.googleusercontent.com/search?q=cache:3viNa_1KktYJ:www.ipo.org/KoehlerVoting_ProcedureUN_Security_Council.pdf+&cd=7&hl=en&ct=clnk&client=firefox-b)

<sup>142</sup>Köchler, H. Op. Cit. pp. 7 - 8

<sup>143</sup> Ibid. p. 9

<sup>144</sup> Ibid.

*when U.S. resolutions faced the increasing threat of being voted down in the General Assembly.”*

This has great implications when it comes to the determination of acts of aggression by the UN Security Council. The findings of the researcher shows that, it is the great powers who hold veto powers in the UN Security Council and their allies who have been involved in or linked to various aggressive wars which have threatened world peace and security. Due to this, various aggressive situations remained unconsidered by the UN Security Council particularly during the cold war in 1960's to 1980's.

In certain occasion, the UN Security Council had an opportunity to determine the existence of acts of aggression but did not. This situation occurred after the invasion of Kuwait by Iraq in 1990 which some authors argue that, Iraq had indeed committed an act of aggression.<sup>145</sup> Instead, the Security Council through Resolution 660 resolved that, those acts constituted the breach of peace and not an act of aggression.<sup>146</sup>

ii. The findings of the researcher from interview and questionnaire methods

Results of the findings of the researcher from the questionnaire method are shown in Table 4.1 below. Generally, twenty four respondents were given questionnaires by the researcher. Out of the total number of the distributed questionnaires only nineteen questionnaires were filled and returned to the researcher. As shown in the table below, fifteen respondent responded positively to the first hypothesis that the voting system of the UN Security Council will always hinder the prosecution of the crime of aggression and the future of the crime itself.

The remaining four respondents did not agree with this hypothesis. They maintain that, although there are challenges associated with the voting system of the UN Security Council particularly on passing of resolutions relating to peace and security,

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<sup>145</sup>Alvik, I. (2003) UN Security Council Resolutions as Authorisation for the Use of Force. Collective Security under Chapter VII of the UN Charter. p. 9 Retrieved July 17, 2016 from the World Wide Web: <https://www.duo.uio.no/bitstream/handle/1085/19756/advartsen.pdf%3Fsequence%3D2>

<sup>146</sup> Ibid.

these challenges will not affect the will of the international community on prosecution of the crime of aggression through the ICC. These four respondents also maintain that, the future of the crime of aggression cannot be affected by the challenges associated with the voting system of the UN Security Council.

**Table. 4.1 showing results of the responded questionnaires on the first hypothesis.**

ANSWERS	IN %	RESPONDENTS
YES	90%	15
NO	10%	4

**Source:** Questionnaires schedule

The researcher also interviewed seven individuals from the law firms and Higher Learning institutions at Mzumbe University and the University of Dodoma. Six interviewees were in support of the hypothesis that the voting system in the UN Security Council on determining acts of aggression will always hinder prosecution of the crime of aggression and the future of the crime itself.

One of the supporting interviewees stated that, *basing on the history of the UN Security Council and the manner they pass their resolutions on matters which affect the interests of any of the permanent members of the Security Council, the Security Council will always pose problems to the prosecution of the crime of aggression.*

Regarding the future of the crime of aggression, one of the interviewees commented that, the consensus reached in Kampala on the definition and prosecution of the crime of aggression is not yet in force under international law. States may avoid signing the Resolution RC/Res 6 due to the requirement of the prior determination of acts of aggression by the UN Security Council before the jurisdiction of the ICC on the crime of aggression is triggered. According to this interviewee, this may affect the future of the crime of aggression because it was one of the issues which was unsuccessfully argued during the debates which preceded the Rome Statute in 1998.

The remaining interviewee who did not agree with the first hypothesis based his argument on the separate roles played by the UN Security Council and the ICC on determination of acts aggression and prosecution of the crime. The interviewee argues that,

*“the proposed amendments of the Rome Statute on the crime of aggression have clearly distinguished the roles played by both organs on aggression. Article 15 (8) bis of the Resolution RC/Res 6 makes it clear that if the UN Security Council does not determine the existence of an act of aggression within six months from the date of notice, the ICC jurisdiction on the crime of aggression can still be triggered by the authorization of the Pre-trial chamber of the ICC.”*

**Table. 4.2 showing results of the responded interview on the first hypothesis.**

ANSWERS	IN %	RESPONDENTS
YES	90%	6
NO	10%	1

**Source:** Interview schedule

**4.1.2. Whether the determination of an act of aggression will always be influenced by the politics of the UNSC hence delaying investigations by the ICC prosecutor**

- i. The findings of the researcher from documentary review.

The UN Security Council has the exclusive powers to determine the act of aggression under Chapter VII of the UN Charter, but the members to the UN Security Council do have different ideology in political matters and even political interest, for example in 1947 up to 1991 there was cold war between two blocs, the western bloc and eastern bloc. Some members to the to the UN Security council were members to the Western Bloc and some of the Eastern Bloc. Security Council Members decisions are still influenced by the politics of these two blocs despite the alleged ending of the cold war and the fall of USSR in 1980’s and 1990’s.

The permanent members have been given the right to veto definition of the question as either it is a situation or a dispute. This meta-veto renders the Charters provisions for abstention obsolete.<sup>147</sup> Andrew Boyd has aptly described the state of powerlessness of the non-permanent members of the Security Council vis-à-vis this arrogance of definition. When a small state has a dispute with a great power, and brings that dispute to the Council, the great power will say it is not a dispute, and will thus retain its right to vote on the dispute. . . .<sup>148</sup>

The UN Security Council saw that aspect as it will be determining matters as to the rules of the UN Charter and there interest of the members of The General Assembly to the UN, but Köchler argues that

*'General Assembly hoped to restrain the permanent members of the Security Council with the lengthy list of types of decisions. The absurdity of this casuistic method shows that power politics if it is the driving force behind the adoption of a procedural norm cannot be contained by mere classification efforts and lofty moral appeals.'*<sup>149</sup>

The second part of the finding of the hypothesis is on the delaying investigations of the crime of aggression by the ICC prosecutor.

The primary role of determination the act of the aggression is given to the UN Security Council by Chapter VII of the UN Charter, which is the substantive matter, whose decision requires affirmative vote by permanent members in the UN Security Council,<sup>150</sup> as its primary responsibility for the maintenance of international peace and security.

As it is also made clear in Article 39 of the UN-Charter, 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 [...], to maintain or restore international peace and security.*

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<sup>147</sup>Köchler, H. Op. Cit. p.21

<sup>148</sup> Ibid , p.21

<sup>149</sup>Köchler, H. Op. Cit. p.18

<sup>150</sup>Article 27(3) of the UN Charter

As stated above, there is a link between the UN Security Council and the ICC on the crime of aggression is based on the jurisdictional requirement. This requirement of determination is not only stipulated in the UN Charter but also stated in the Resolution RC/Res 6 which requires the prosecutor of the ICC to have regard to prior determination of an act of aggression by the Security Council.<sup>151</sup> Where in paragraph 7 of the same article allows the prosecutor to proceed with investigations on the crime of aggression if the UN Security Council has determined an act of aggression.

Not only there is requirement of determination of the acts of the crime by the UN Security Council but also there is requirement of time given to the prosecutor of the ICC, to start investigation on the act of the crime which is six month from the date a notification by the prosecutor was made to the Secretary General of the UN<sup>152</sup>. The expiry of six months does not give automatic permit for the prosecutor to proceed with investigations on the crime of aggression.

The Pre-Trial Chamber must first authorise the commencement of investigations in respect of the crime of aggression by the prosecutor provided that the Security Council has not exercised its deferral powers under article 16 of the Rome Statute.<sup>153</sup>

This determination of the acts of the crime will always be influenced by the politics of the UN Security Council, and with the pre conditional of time required in the amended Rome Statute do make delay of the investigation of the crime of aggression by the ICC, only if the UN Security Council do affirm that there is act of the crime of aggression, and leads non institutional independence of the ICC on the crime of aggression and the confidence of the international community on the prosecution of the crime of aggression, is highly effected due to subordination of the ICC to the UN Security Council whose decisions are influenced by the politics of its permanent members.

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<sup>151</sup> Article 15 (6) *bis* of the Rome Statute, as amended in 2010

<sup>152</sup> Article 15 (8) *bis* of the Rome Statute, as amended in 2010

<sup>153</sup> *Ibid.*

- ii. The findings of the researcher from interview and questionnaire methods

Results of the findings of the researcher from the questionnaire method are shown in Table 4.2 below. Generally, twenty four respondents were given questionnaires by the researcher. Out of the total number of the distributed questionnaires only nineteen questionnaires were filled and returned to the researcher. As shown in the table below, fifteen respondent responded positively to the first hypothesis that the determination of an act of aggression will always be influenced by the politics of the UNSC hence delaying investigations of the crime of aggression by the ICC.

The remaining four respondents did not agree with this hypothesis. They maintain that, the determination of an act of aggression will not be influenced by the politics of the UNSC, as the ICC is independent legal institution which has a legal personality and its organ which has been established by law. These four respondents also maintain that, the future of the crime of aggression cannot be affected by the challenges associated with the politics of the UN Security Council.

**Table. 4.3 showing results of the responded questionnaires on the second hypothesis.**

ANSWERS	IN %	RESPONDENTS
YES	79%	15
NO	21%	4

**Source:** Questionnaires schedule

The researcher also interviewed seven individuals from the law firms and Higher Learning institutions at Mzumbe University and the University of Dodoma. Five interviewees were in support of the hypothesis that the determination of an act of aggression will always be influenced by the politics of the UNSC hence delaying investigations of the crime of aggression by the ICC.

Most of the supporting interviewees stated that, the UNSC will not refer the matters to the ICC because of the politics interest which the members to the UNSC rather than for judicial reasons. The members to the UNSC do have their interest, mostly is political that they can safe guard economic powers. One interviewee went further by saying, members of the UNSC will protect even the countries who are their allies, not to determine the act of aggression if the member or the countries which are allies to that members to the UNSC because of political interest.

The other said that, *the cold war has ended but still the decisions made by the members to the UNSC are based on which bloc they were or supporting to, example the decision made or any suggestion by China will be supported by the Russia.* The decisions will base on the political interest by the permanent members to the UN Security Council. This may affect the future of the crime of aggression.

There were interviewee who did not agree with the second hypothesis based his argument on the separate roles played by the UN Security Council and the ICC on determination of acts aggression and prosecution of the crime. The interviewee argues that,

*“The ICC withstand the political pressures that it may face and act completely independent, because the Rome Statute provides robust mechanisms to protect fully the independence of the Court and to safeguard if from political influence.”*

One interviewee was not certain if political influence could affect the future crime of aggression due to the interplay between the ICC and UNSC, *“because the it is the decision of the members to make the future of the crime or not as its required by the Res no 6 of the Kampala on 01<sup>st</sup> January 2017.”*

**Table. 4.4 showing results of the responded interview on the first hypothesis.**

ANSWERS	IN %	INTERVIEWED PERSONS
YES	71%	5
NO	14.5%	1
NOT SURE	14.5%	1

**Source:** Interview schedule

**4.1.3. Whether institutional independence of the ICC on the crime of aggression and confidence of the international community on prosecution of the crime of aggression is highly affected due to subordination of the ICC to the UN Security Council whose decisions are influenced by the politics of its permanent members**

- i. The findings of the researcher from documentary review

The ICC was established on 17 July, 1998 after the adoption of the Rome Statute of the International Criminal Court.<sup>154</sup> It is a permanent court and an independent organ with international legal personality.<sup>155</sup> It has been conferred jurisdiction by the Rome Statute and it functions under the rules of the same statute.<sup>156</sup>

The permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>157</sup> The ICC has jurisdiction to try these offences with the exception of the crime of aggression whose jurisdiction will be confirmed in January 2017 depending on the agreement of states parties.

On the crime of aggression, the UN Charter<sup>158</sup> provides that it is only the UN Security Council that does has the power to determine whether the act of aggression exists or not. For example, on 2 August 1990, Iraqi troops started an invasion and subsequent annexation of Kuwait. Resolution 660 was adopted by the Security Council the same day, determining that Iraq's invasion of Kuwait constituted a "breach of international peace and security" and not an act of aggression<sup>159</sup>.

This requirement of determination not only is it stipulated in the UN Charter but also stated in the amended Rome Statute of 2010 where it is required that the prosecutor of the ICC to ascertain if the Security Council has made any determination on the

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<sup>154</sup>Ibid.

<sup>155</sup>Ibid. Also articles 1 and 4 (1) of the Rome Statute, 1998.

<sup>156</sup>Article 1 of the Rome Statute, 1998.

<sup>157</sup>Understanding the International Criminal Court. A booklet by the International Criminal Court. p. 3. Retrieved May 25, 2016 from the World Wide Web: <https://www.icc-cpi.int/resource-library/Documents/UICCEng.pdf>

<sup>158</sup>Article 39 of the UN Charter.

<sup>159</sup>Köchler, H. Op. Cit. p.31

existence of the crime committed by the state concerned before proceeding with investigations on the crime of aggression.<sup>160</sup> Where in paragraph 7 of the same article allows the prosecutor to proceed with investigations on the crime of aggression if the UN Security Council has determined an act of aggression.

There is also another requirement of time given to the prosecutor of the ICC, to start investigation on the act of the crime which is six months from the date a notification by the prosecutor was made to the Secretary General of the UN.<sup>161</sup> The expiry of six months does not give automatic permit for the prosecutor to proceed with investigations on the crime of aggression. The Pre-Trial Chamber must first authorise the commencement of investigations in respect of the crime of aggression by the prosecutor provided that the Security Council has not exercised its deferral powers under article 16 of the Rome Statute.<sup>162</sup>

This determination of the acts of the crime by the UN Security Council, and with the conditional of time required in the amended Rome Statute do cause delay of the investigation of the crime of aggression by the ICC, only if the UN Security Council does affirm that there is an act of the crime of aggression, and leads to non-institutional independence of the ICC on the crime of aggression and the confidence of the international community on the prosecution of the crime of aggression, is highly affected due to subordination of the ICC to the UN Security Council decision.

ii. The findings of the researcher from interview and questionnaire methods

Results of the findings of the researcher from the questionnaire method are shown in Table 4.3 below. Generally, twenty four respondents were given questionnaires by the researcher. Out of the total number of the distributed questionnaires only nineteen questionnaires were filled and returned to the researcher. As shown in the table below, fifteen respondent responded positively to the third hypothesis that the institutional independence of the ICC to prosecute the crime of aggression is highly affected due to subordination of the ICC to UN Security Council, whose decision are influenced by

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<sup>160</sup> Article 15 (6) *bis* of the Rome Statute, as amended in 2010

<sup>161</sup> Article 15 (8) *bis* of the Rome Statute, as amended in 2010

<sup>162</sup> *Ibid.*

the politics of its permanent members will always hinder the prosecution of the crime of aggression and the future of the crime itself.

The remaining four respondents did not agree with this hypothesis. They maintain that, although there are challenges associated with the institutional independence of the ICC to prosecute the crime of aggression is highly affected due to subordination of the ICC to UN Security Council, whose decision are influenced by the politics of its permanent members, these challenges will not affect the will of the international community on prosecution of the crime of aggression through the ICC. These four respondents also maintain that, the future of the crime of aggression cannot be affected by the challenges associated with the voting system of the UN Security Council.

**Table. 4.5 showing results of the responded questionnaires on the third hypothesis.**

ANSWERS	IN %	RESPONDENTS
YES	90%	15
NO	10%	4

**Source:** Questionnaires schedule

The researcher also interviewed seven individuals from the law firms and Higher Learning institutions at Mzumbe University and the University of Dodoma. Six interviewees were in support of the hypothesis that the voting system in the UN Security Council on determining acts of aggression will always hinder prosecution of the crime of aggression and the future of the crime itself.

One of the supporting interviewees stated that, *basing on the history of the UN Security Council and the manner they pass their resolutions on matters which affect the interests of any of the permanent members of the Security Council, the Security Council will always pose problems to the prosecution of the crime of aggression.*

Regarding the future of the crime of aggression, one of the interviewees commented that, the consensus reached in Kampala on the definition and prosecution of the crime of aggression is not yet in force under international law. States may avoid signing the Resolution RC/Res 6 due to the requirement of the prior determination of acts of aggression by the UN Security Council before the jurisdiction of the ICC on the crime of aggression is triggered. According to this interviewee, this may affect the future of the crime of aggression because the institutional independence of the ICC to prosecute the crime of aggression will be highly affected due to the subordination of the ICC to the UN Security Council whose decision is influenced by the politics of its permanent members.

The remaining interviewee who did not agree with the third hypothesis based his argument on the independence of the ICC to prosecute the crime of aggression not on the influence of political decisions of the members of the UN Security Council. The interviewee argues that,

*“The independence of the Court as an institutional is particularly relevant when it comes to the selections that are to be investigated by the office of the Prosecutor and, eventually, of cases that are brought to trial. The Rome Statute provides several mechanisms to ensure that no undue political influence can be exercised over the ICC and its Prosecutor. The Prosecutor may open an investigation into a situation on his own without a referral if he believes that there are reasonable grounds for such step. Thus the Prosecutor can do his work independent from political influence, but the politics can affect the ICC, when the financing states when they can exercise political influence on the ICC by not allocating sufficient money to the ICC.”*

**Table 4.6: showing results of the responded interview on the third hypothesis.**

ANSWERS	IN %	NO. OF INTERVIEWED
YES	90%	6
NO	10%	1

**Source:** Interview schedule

## **4.2 Conclusion**

Generally, in one way or another there have been a lot that different authorities related with the ICC trying to work hard on a number of issues in relation to the full subjection of the crime of aggression under the ICC. However, it is still a challenge on this subject matter but provided that though the Security Council is given powers to determine by the veto vote, the decision on determining is also based on the political influence to the members of the Security Council, hence delaying investigations of the crime of aggression by the ICC. And the existence of acts of aggression of states concerning the ICC's independency should be static in carrying on its own matters. Therefore, the ICC has power to make its own findings then let it determine itself the existence of the acts of aggression and not otherwise.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 Introduction**

This chapter provides conclusion and recommendations of the study based on findings and interpretations of the study findings based on the data or information that was gathered from the selected study areas. The details are organised in line with the specific objectives of the study as follows:

#### **5.1 Conclusion**

The issue of the crime of aggression: with the interplay between the ICC and UNSC is so difficult for the crime to be prosecuted by the ICC, as the findings of the study do reveal in the above chapter (four).

The research reflects the ongoing debate on the crime of aggression and the ICC on the future crime of aggression: the interplay between the ICC and the UN Security Council.

The effectiveness of the ICC to attend the matter in the acts of crime of aggression independently without being interfered is not there as the prosecutor of the ICC cannot conduct the investigation unless the UN Security Council has to vote if the acts of the crime have been done first. This voting system is done by nine members whom five of them are the permanent members of the UN Security Council, in which three members from the permanent members to the UN Security Council are not members of the Rome Statute, who have also been blamed to have committed this crime of aggression in some instances. This voting system is provided under the chapter VII of the UN Charter. The effect of this system of voting by the members of the UN Security Council, in order to determine the acts of the crime of aggression undermines the ICC not to attend the acts of the crime of aggression.

The determination of the crime by the UN Security Council is the bar for the future crime of aggression. The determination is also the requirement of the law as it is mandatory process as to article 39 of the UN Charter and even the Rome Statute as amended in 2010 provide the same. The UN Security Council has to determine whether the acts of the crime have been committed or not first, which up to now the UN Security Council has not determined which these acts of crime have been committed. In which up to now the ICC prosecutor has not investigated any acts of the crime of aggression.

Delay of the investigation of the crime, that is even if the UN Security Council will determine the acts of the crime which have been committed, the ICC prosecutor cannot automatically start the investigation, where the Rome Statute itself gives the prosecutor six months after has notified the UN Secretary General on the matter, and when the six months' notice expires, will not automatic permit the prosecutor to proceed with investigations of the crime.

The determination of the UN Security over the acts of the crime of aggression has made the ICC independency to prosecute the crime to be highly affected due to subordination of the ICC over the UN Security Council whose decisions are influenced by politics of the permanent members to the UN Security Council. This is also another big bar to the ICC as the Rome Statute provides the crime of aggression but are conditions which hinder the ICC to prosecute the crime, due to the political interest of the permanent members to the UN Security Council, and when saying politics is when the members have interest on economic gain, that will also secure the interest as super powers, in which the permanent members to the UN Security Council will not let the ICC freely to this act of crime of aggression. The head of the U.S delegate to the Kampala conference noted that, *“Accordingly, there is some potential that the proposed aggression regime could reduce the effectiveness of the Council’s mechanisms for addressing situations that may be of concern to the United States.* By his statement above, the U.S government will not let the Security Council to be freely prosecuted by the ICC, it will still be under the supervision of UN Security Council on

the crime of aggression, which means it is likely that ICC will never attend the acts of the crime of aggression.

The Kampala conference of ICC adopted Resolution RC/Res 6, “Crime of aggression by Consensus”, there were changes made, including the definition of the crime of aggression. In order for the changes to operate, the members state have to be ratified, which two-third of ratification is needed up to 1<sup>st</sup> January, 2017. In this, there is a problem to get the two-third as most of the members to ICC as African states have no faith to the ICC. Recently the African states leaders have been giving open statement that they have no faith, and encourage other African states to withdraw their membership from the ICC. The statement has also been made in the African Union General meetings and President Yoweri Kaguta Museveni of Uganda has promised to present the agenda to the next African Union General Meeting. The African State leaders in their statement opt to have the African Court that will have the similarities with the ICC but will be for Africa only. Up to now Africa has African Court for Human and Peoples’ Rights.

## **5.2 Recommendations**

Based on the findings of this research, the researcher came up with the following recommendations that will assist in dealing with the challenges facing the ICC in the prosecution of the crime of aggression:

- a) The voting system of the UN Security Council in determining the act, should not base on the nine members including the permanent members Security Council, it could involve all members of UN as to reduce the monopoly and politics of the permanent members of the UN Security Council.
- b) The determination Acts of the crime of aggression done by the nine members, either it should be done by the ICC or by all members of the UN as to have good future of the crime of aggression.

- c) The Rome Statute should have some amendments on some article especially article 15(8) as amended in 2010, that to reduce the six month to two month.
- d) Prohibiting the ICC from exercising its jurisdiction is an indefinite guarantee of continuing immunity for future aggressors what to be done is to enable the ICC to deter or bring to justice those leaders guilty of the crime of aggression.
- e) There should be possibility of allowing states to accept the ICC's state referral or prior motu jurisdiction on a voluntary basis, both with room for Security Council pre-clearance, and also with the possibility of aggression investigations without such pre-clearance where states had asserted to such unrestricted jurisdiction.
- f) The ICC itself has to work as it was intended to, that is to make the African states who are part to it, to have trust on the ICC and have good cooperation that the Africa states parties can help the ICC; it can even prosecute the crime of aggression in the future.
- g) The international community has much to gain from the crime of aggression being prosecutable and this will be a positive step that individual liability, instead of merely the state act, is taken up by the statute. It is my view that in states own interest aggression should be criminalised specifically for the sake of stability and economic growth.
- h) The international community should enact new laws which will deal with all challenges facing the crime of aggression, that will enable the crime to investigated and prosecuted by the ICC without any complications from UN Security Council.
- i) Another recommendation is to the states parties who are members to the UNSC, especially U.S, China and Russia that they should join the ICC as members and opt out on the article of aggression, as the first step at least to smooth the road for the future of the aggression.

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#### **D. INTERNET SOURCES**

[https://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand\\_Pact](https://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand_Pact)

UN\_Security\_Council.pdf+&cd=7&hl=en&ct=clnk&client=firefox-b

#### **DECLARATIONS AND RESOLUTIONS**

Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal, G.A Res. 95(1). UN GAOR, 1<sup>st</sup> Session, 55<sup>th</sup>Plen. Mtg., (1946)

Moscow Declaration on German Atrocities of 30 October 1943.

The London Agreement of 8 August 1945 (The London Agreement, 1945)

GA Res. 3344(XXIX) adopted on 14.12.1974.

Resolution RC/Res 6, 2010

#### **INTERNATIONAL CONVENTIONS**

The Covenant of the League of Nations, adopted 28.06.1919

## APPENDICES

### APPENDIX 1

#### INTERVIEW SCHEDULE FOR RESPONDENT

##### Re: **REQUEST FOR RESPONDING TO INTERVIEW SCHEDULE**

Reference is made to the above heading. I am a student of Mzumbe University pursuing Master of Laws (LL.M) in International Law. The successful completion of the programme requires the student to undertake a research study. To that end, am currently undertaking a study on: *The Future Crime of Aggression: the Interplay between ICC and UNSC*.

Information given will be used for research purpose only and the research paper will be for public use.

As such I have prepared interview schedule in a bid to execute the study.

I therefore request your assistance in accomplishing this task

I thank you in advance for your favourable response to my request

Yours truly,

Kikula Suleiman,

Mzumbe University.

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This interview schedule is seeking to find out *The Future Crime of a Aggression: the Interplay between ICC and UNSC*.

ICC: International Criminal Court  
UNSC: United National Security Council

**A: PERSONAL PARTICULARS**

1. Sex.....
2. Age.....
3. Occupation.....
4. Level of Education.....

**B. QUESTIONS**

1. Do you know the crime of aggression?  
(a) Yes (b) No
2. Do you know the International Criminal Court?  
(a) Yes (b) No (c) Somehow
3. Do you know the United National Security Council?  
(a) Yes (b) No (c) Somehow
4. Does the ICC have power to investigate and trial the crime of aggression.  
(a) Yes (b) No
5. Do you know the law concerning the crime of aggression in the ICC statute and the UN charter?  
(a) Yes (b) No (c) Somehow

6. Will the UNSC let the ICC to investigate and try the crime of aggression with convenience?

(a) Yes (b) No

If yes what is your opinion about that

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7. Do you think the members state to the UNSC have any interest that will not want the ICC to investigate and try the crime of aggression freely?

Yes (b) No

If yes what is your opinion about that

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8. Do you think the voting system by the UN Security Council will always hinder prosecution of the crime of aggression and the future crime?

Yes (b) No

If yes what is your opinion about that

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9. Do you think the determination of acts of aggression will always be influenced by the politics of UN Security Council?

(a) Yes (b) No

Yes (b) No

If yes what is your opinion about that

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10. Does the institutional independence of the ICC on the crime of aggression and confidence of the international community on prosecution of the crime of aggression highly affected due to subordination of the ICC to UN Security Council decisions?

(a) Yes (b) No

If yes what is your opinion about that

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.....  
.....

11. Does the Kampala ICC review conference 2010 will be the solution for ICC to try the crime of aggression without the intervention of the UNSC?

(a) Yes (b) No

12. Does the recent Kampala conference have addressed all the challenges of prosecuting the crime of aggression?

(a) Yes (b) No

13. Do you think there are any future prospects of the crime of aggression?

(a) Yes (b) No

14. Do you think the thirty states will ratify the amendments on the Kampala conference on review of ICC?

(a) Yes (b) No

15. Do you think the two –third of the state parties will activate the jurisdiction of the ICC on the crime of aggression after 1<sup>st</sup> January, 2017?  
(a) Yes (b) No

End of interview schedule.

Thank you for taking time to respond to the questions.