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PROSECUTING AGGRESSION: THE CONSENT PROBLEM AND THE ROLE OF THE SECURITY COUNCIL

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Prosecuting Aggression: The Consent Problem and the Role of the Security Council

Dapo Akande*

Summary

This paper focuses on the conditions which ought to exist before the International Criminal Court can exercise jurisdiction over the crime of aggression. In particular, it addresses (i) whether the Court should be competent to exercise jurisdiction where the alleged aggressor State has either not accepted the amendment on aggression, or is not a party to the ICC Statute and (ii) whether ICC jurisdiction on aggression should be made dependent on the prior approval of the United Nations Security Council. The first issue is referred to here as the "consent problem" and the second the "Security Council problem/issue".

This paper argues that the consent problem raises a fundamental question of deeper significance than the textual or perhaps technical issues concerning the way in which the amendment concerning aggression might come into force under Article 121 of the Statute. The consent problem raises fundamental issues about the nature of the ICC as an international tribunal and about the principles governing the competence of international tribunals under international law. In particular, the consent issue raises important questions about the jurisdiction of international tribunals over non-consenting States and whether the ICC is to be regarded as bound by rules of international law that would ordinarily bind other international tribunals.

This paper, outlines and explains the principle of consent as applied to the competence of international tribunals. There is a detailed discussion, in Section 2, of the application of the principle to cases before international tribunals where the tribunal is called upon to determine the rights and obligations of States not before the tribunal. In particular, this section discusses the Monetary Gold principle enunciated by the International Court of Justice. According to that principle, the Court will not adjudicate on a case where the Court would be required, as a necessary prerequisite, to adjudicate on the rights or responsibilities of a non-consenting and absent third State. It is argued that this principle is simply an application of the more general principle of consent and that the principle is derived from the more fundamental principle of the independence of States, i.e. the idea that States are not subject to external authority of other States or institutions created by other States.

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The paper argues, in Section 3, that because a determination that an individual has committed the crime of aggression requires a prior determination that a State has committed an act of aggression and a breach of the UN Charter, the ICC would act in violation of the consent principle in cases contemplated by the aggression amendment. The paper then turns, in Section 4, to an examination of whether the consent principle and the Monetary Gold principle (which is an application of that more general principle) are applicable to international criminal tribunals in general and to the ICC in particular. Referring to the case law of other tribunals, it is argued that these principles apply to all international tribunals and that the form in which the proceedings involving adjudication of the responsibilities of other States takes place is irrelevant to their application. Section 5 examines which States are to be regarded as non-consenting States for the purpose of the application of the consent principle. I then turn to the Nuremberg and Tokyo precedents in Section 6. I argue that the establishment and operation of these tribunals would not support the view that a rule has developed permitting departure from the consent principle in international criminal tribunals. I argue that neither tribunal was truly international and that in any event, in both cases, there was the consent of the relevant sovereign authority.

The paper considers, in Section 7, whether the jurisdiction of the ICC over aggression can be justified on the basis of a transfer of authority from the State that is the alleged victim of aggression. It is argued that though victim States can prosecute for aggression and though transferred jurisdiction is an appropriate justification for the jurisdiction of the ICC in general, the principles and precedents which support transfers of jurisdiction to international tribunal do not apply to aggression. Section 8 returns to the Security Council issue and considers whether prior determination by the Council (or by the General Assembly or ICJ) would fall within an exception to the Monetary Gold principle. It is argued that the best way to expand the jurisdiction of the Court to non-consenting States while respecting the principle of consent is by referral of situations to the Court by the Council. When the consent problem is taken into account, the role of the Security Council in making referrals to the ICC with regard to aggression is not a limit on the competence of the Court. Rather the Security Council comes to the aid of the Court and expands its jurisdiction to situations where the ICC would otherwise be legally incompetent to act. On this view, giving the Security Council almost exclusive competence with regard to aggression cases is not to be regarded as a problem to be overcome, but rather as a means of overcoming an existing problem.

The final section is the main theoretical contribution of the piece, considering whether the deviation from the consent principle contemplated with regard to the ICC's jurisdiction over aggression is to be regarded as an evolution of the law or instead a violation.

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1. Introduction

There now appears to be substantial agreement among States as how to define the crime of aggression for the purposes of the Rome Statute of the International Criminal Court ("ICC Statute or Rome Statute"). This agreement is reflected in Draft Article 8*bis* prepared by the Special Working Group on the Crime of Aggression ("SWCA" or "Working Group"), which completed its work in February 2009.[1] That definition is based on General Assembly Resolution 3314. This article does not focus on issues arising out of that definition (important as those issues are). Suffice it to note that the definition has been criticized as an inadequate basis for a criminal offence.[2] It has been argued that the definition is irretrievably vague and does not provide sufficiently reliable guidance on which leaders can base their actions. The main problem with the proposed definition arises out of the attempt by the Working Group to restrict the acts which would amount to the crime of aggression under the Statute to those acts of aggression "which by [their] character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." This is an attempt to restrict the crime to something akin to the war of aggression prosecuted by the Nuremberg and Tokyo Tribunals after the Second World War but there is an understandable reluctance to use the word "war", a word and concept modern international law eschews. What is unsatisfactory about this definition is that it is not clear what the "manifest" requirement relates to. Does it cover "serious" uses of force? Or (more in keeping with the literal meaning of the word) does it cover "obviously illegal" uses of force? Clearly, a use of force which is actually unlawful may be serious but not obviously unlawful. By contrast, a use of force can be obviously illegal but not serious. Alternatively, a use of force may be both serious as well as obviously illegal. Is the proposed amendment intended to cover all three of those situations, two of them or just one? Apparently, the intent is to cover only those uses of force which are *both* serious and obviously illegal.[3] However, it does not appear that the form of words currently used achieves this aim. Furthermore, it would be more in keeping with customary international law to criminalise only those illegal uses of force which have grave consequences and are particularly serious.[4] It is not clear why the illegality of the use of force also needs to be obvious. As Paulus has pointed out, the obviousness requirement simply invites leaders to rely on legal advice (which may be outside the mainstream of legal opinion) as a justification for what would otherwise be an act of aggression.[5] In short, an "obviously illegal" requirement

[1] *Report of the Special Working Group on Aggression,* ICC-ASP/7/SWGCA/2 (20 Feb. 2009).
[2] See, eg, Paulus, "Second Thoughts on the Crime of Aggression", (2009) 20 *EJIL* 1117; Murphy, "Aggression, Legitimacy and the International Criminal Court", (2009) 20 *EJIL* 1147; Glennon, "The Blank-Prose Crime of Aggression", (2010) 35 *Yale J. Int. Law* 71.
[3] Kress, "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus", (2009) 20(4) *EJIL* 1129.
[4] Cassese, "On Some Problematical Aspects of the Crime of Aggression" (2007) *Leiden JIL* 841, 845; Dinstein, *War, Aggression and Self-Defence* (2005, 4th ed), 125-6.
[5] Paulus, above n2, 1123.

effectively provides a mistake of law defence which would not be available for other crimes.[6] It seems to me that the definition would be improved by focussing attention solely on the seriousness of the use of force.

This paper does not dwell on the definition of aggression. Instead, I intend to focus on the deep divisions regarding the conditions which ought to exist before the International Criminal Court can exercise jurisdiction over the crime of aggression. Assuming the political decision is made that the crime of aggression, which is already included in the Rome Statute, ought to be activated, it is unclear whether the Court should be competent to exercise jurisdiction where the alleged aggressor State has either not accepted the amendment on aggression, or is not a party to the ICC Statute.[7] I refer to this as the "consent problem" as it raises the question of which States (if any) must consent before the Court would be able to prosecute the crime of aggression. It is also unclear what the relationship ought to be between the ICC and the Security Council with respect to the crime of aggression. In particular, the question raised here is whether the ICC Prosecutor should be able to investigate and prosecute the crime of aggression only in circumstances where the Security Council has a made a prior determination that aggression has been committed by the State concerned.[8] Or should the determination that aggression has been committed by the relevant State be left to the decision of the ICC (or perhaps some other body, such as the UN General Assembly or the International Court of Justice) in which case Security Council determination of State responsibility for aggression would not be a precondition for ICC jurisdiction? I will call this the "Security Council problem".

The consent issue, though of great importance for the application of the amendment relating to aggression, has thus far been considered a rather technical question which revolves around the interpretation and application of the amendment provisions of the ICC Statute.[9] In particular, the question is seen as raising the issue of how States parties will become bound by the amendment. Will the entry into force of the amendment require 7/8ths acceptance as is provided for in Article 121(4) of the Statute[10] (with the result that the amendment is then binding even on non-accepting parties)? Or will the amendment only be binding on each State

[6] Art. 32(2) of the Rome Statute provides that in general a mistake of law shall not be a ground for excluding criminal responsibility under the Statute.

[7] See paras. 32-43 & Annex III, ICC-ASP/8/INF.2 (10 July 2009), *Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009*.

[8] June 2008 Report of the Special Working Group, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed sixth session, New York, 2-6 June 2008* (ICC-ASP/6/20/Add.1), annex II, paragraphs 38-48; and, 2007 Princeton report, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (ICC-ASP/6/20), vol. I, annex III, paragraphs 14-35.

[9] See ICC-ASP/8/INF.2 (10 July 2009), above n7, paras. 33-38.

[10] Art. 121(4) provides: "Except as provided in paragraph 5, an amendment shall enter into force for all States parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them."

party that accepts the amendment as provided for in Article 121(5) of the Statute?[11] There is an assumption that whichever method is adopted, the amendment will apply to non-States parties who commit aggression on the territory of a State party that is bound by the amendment.[12] There also seems to be an assumption in the negotiation of the amendment that the issue of consent only arises in ICC cases initiated by referral of a situation to the ICC by a State Party[13] or in cases where the prosecutor exercises his *propio motu* powers[14] of investigation and prosecution. In other words, the question of consent is not considered to arise where the ICC is exercising jurisdiction with respect to aggression on the basis of a Security Council referral.[15]

However, this approach fails to appreciate that the consent problem raises a more fundamental question of deeper significance than the textual or perhaps technical issues concerning the way in which the amendment concerning aggression might come into force. The issues raised are not simply matters of how the Rome Statute is to be interpreted or amended. The consent problem raises fundamental issues about the nature of the ICC as an international tribunal and the principles governing the competence of international tribunals under international law. In particular, the consent issue raises important questions about the jurisdiction of international tribunals over non-consenting States and whether the ICC is to be regarded as bound by rules of international law that would ordinarily bind other international tribunals. The consent issue also raises questions about the basis on which the ICC exercises jurisdiction over international crimes. In particular, is the conferral by States, of jurisdiction on the ICC to be conceptualised as a transfer by States parties of jurisdiction which the States themselves possess? If so, is such a transfer of jurisdiction possible and appropriate in the case of aggression?

Furthermore, there is a closer relationship than has previously been recognised between the consent problem (whether the Court should exercise jurisdiction with respect to aggression where the alleged aggressor State has not accepted the aggression amendment or is not a party to the ICC Statute) and the Security Council problem (whether the ICC should only be able to prosecute the crime of where the Security Council has a made a prior determination that aggression has been committed). Discussions of the Security Council issue have focussed on questions about the respective roles of the ICC and the Security Council within

[11] Art. 121(5) provides: "Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

[12] *Report of the Special Working Group on Aggression,* ICC-ASP/7/SWGCA/2, see para. 8, Scenario 7 of the table in Annex II, Non-Paper on Other Substantive Issues on Aggression to be addressed by the Review Conference.

[13] Art. 13(a), ICC Statute.

[14] Art. 13(c) & Art. 15 ICC Statute.

[15] See para. 32 (as well as paras. 4 & 8 of Annex III), ICC-ASP/8/INF.2 (10 July 2009), *Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009*: "The Chairman noted that consent of the alleged aggressor State was only relevant to State referrals and *proprio motu* investigations."

the framework of international law and international politics. There is a general issue as to how States might make space for international criminal justice given that international crimes are often committed in circumstances where there has been a breach of the peace, and the United Nations Charter gives the Security Council primary responsibility for the maintenance of international peace and security.[16] The question posed is how the Security Council's responsibilities are to be squared with the demands of international criminal justice.[17] Although these issues arise with respect to all international crimes, the problem is more acute in relation to aggression since Article 39 of the Charter stipulates that the Security Council may make determinations with respect to aggression. Although the ICC will be determining whether an individual has committed the crime of aggression, it is nonetheless accepted that this crime can only be committed where a State has committed an act of aggression. Since the Security Council is explicitly given the competence by the Charter to make determinations about that latter issue, some have taken the view that decisions by the ICC on the same issue may lead to conflicts between the Council and the ICC and, even worse, may constrain the peace-making efforts of the Council.[18]

Article 5(2) of the ICC Statute provides that subsequently negotiated provisions defining the crime of aggression and setting out conditions for the exercise of ICC jurisdiction "shall be consistent with relevant provisions of the Charter of the United Nations." Some have taken this to mean that, in light of Article 39 of the Charter, there must be a Security Council determination that aggression has occurred before the ICC can exercise jurisdiction over the crime of aggression.[19] This interpretation would give the ICC Statute an effect similar to the International Law Commission's Draft Statute on the International Criminal Court, which included the crime of aggression but required a prior Security Council determination that aggression had been committed by the relevant State.[20]

This interpretation of Article 5(2) of the ICC Statute does not follow from the Charter.[21] The International Court of Justice has long made clear that, under the Charter, the Security Council's competence in the area of peace and security is "primary" but not "exclusive".[22] Other organs of the UN are competent to act with respect to matters which implicate peace

[16] Article 24(1), UN Charter.
[17] See, Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council", in McGoldrick, Rowe & Donnelly, *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 95.
[18] See Carpenter, "The International Criminal Court and the Crime of Aggression", (1995) 64 *Nordic Journal of International Law* 223, 233.See also Glennon, above n2, 105-9.
[19] See the views of the UK when the Rome Statute was adopted, A/CONF.183/13 (Vol. II) 124.
[20] Article 23(2) ILC Draft Statute for the International Criminal Court, (1994) *Yearbook of the International Law Commission,* vol. II (Part Two). See Crawford, "The ILC's Draft Statute for an International Criminal Tribunal", (1994) 88 *AJIL* 134,147; Crawford "The ILC Adopts a Statute for an International Criminal Court", (1995) 89 *AJIL* 404, 411.
[21] See Blokker, "The Crime of Aggression and the United Nations Security Council", (2007) 20 *Leiden JIL* 867, 878-80.
[22] See *Certain Expenses of the United Nations Advisory Opinion* (1962) ICJ Rep. 151, 163.

and security.[23] Although the UN General Assembly is debarred from making recommendations on a dispute or situation that is under consideration by the Security Council,[24] the ICJ has stated that it (the ICJ) is competent to act even while a matter is being considered by the Security Council.[25] Furthermore, there is no legal bar on other UN organs or indeed non-UN organs making determinations that an act of aggression has been committed.[26] It is certainly clear that, since an act of aggression is a violation of the prohibition of the use force in international law and in the UN Charter, the International Court of Justice is competent to determine that such a violation has occurred, and to term that violation aggression.[27] For these reasons, it has been stated that: "The *legal* reasons for the proposal that the Security Council should make a prior determination [that aggression has been committed] . . . are weak."[28] Thus, the question of whether a Security Council determination that an act of aggression has been committed should be a precondition for the ICC to initiate an investigation or prosecution, is usually conceived of as a question of *policy*.[29]

However, as this article shows, there are other legal reasons (i.e., apart from those reasons traditionally put forward with respect to the responsibilities of the Council under the UN Charter) which may justify the involvement of the Security Council prior to ICC prosecution for aggression. To the extent that the consent issue raises questions as to the competence of the ICC to decide on aggression committed by a non-consenting State, it will be argued that there are areas where the ICC is *legally required* to stay its hand in cases concerning aggression unless there is the involvement of the Security Council prior to the prosecution. Viewed in this way, a requirement of prior Security Council determination (at least with respect to non-consenting States) is not about ensuring consistency between the Statute and the United Nations Charter. Instead, it is a way of ensuring consistency between the Statute and general international law. Furthermore, requiring Security Council permission with respect to non-consenting States is not about *restricting* the jurisdiction of the ICC in order to accommodate the work of the Council. Instead, it should be viewed as a means of *expanding* the jurisdiction

[23] See Arts. 10-14 of the UN Charter, which clearly indicate the competence of the General Assembly in relation to matters concerning peace and security. See also General Assembly resolution "*Uniting for Peace"* GA Res 377(V) of 1950.
[24] Art. 12(1) UN Charter.
[25] See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (1984) ICJ Rep 392, para. 95.
[26] The General Assembly has on six occasions found 'aggressive acts', 'acts of aggression' or 'aggression' to have been committed. Each of the six involved several resolutions, but only the first of each is listed here: the actions of China in Korea (GA Res 498(V) (1951); the occupation of Namibia by South Africa (GA Res 1899(XVIII) (1963); actions of South Africa in other African states (GA Res 2508 (XXIV) (1969); acts committed by Portugal against Guinea-Bissau and Cape Verde (GA Res 2795) (XXIV) (1971); acts committed by Israel against Iran, Lebanon, the Palestinian people and its occupation of the Golan Heights (eg GA Res 36/27 (1981) and others); and acts by Serbia and Montenegro against Bosnia and Herzegovina (GA Res 46/242 (1992). See Blokker, above n21, 881.
[27] See the Separate Opinions of Judge Simma (para. 2) and Judge Elaraby (para. 10), *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (2005) ICJ Rep 1.
[28] Cryer, Friman, Robinson & Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2007), 278, emphasis in original.
[29] See *Idem*; Blokker above n21, 886-7.

of the Court in circumstances where it might otherwise lack competence to act. In this way, the Council might be viewed as coming to the aid of the ICC.

Section 2 of this paper, outlines and explain the principle of consent as applied to the competence of international tribunals. There is a discussion of the application of the principle to cases before international tribunals where the tribunal is called upon to determine the rights and obligations of States not before the tribunal. Section 3 argues that because a determination that an individual has committed the crime of aggression requires a prior determination that a State has committed an act of aggression and a breach of the UN Charter, the ICC would act in violation of the consent principle in cases contemplated by the aggression amendment. Section 4 considers whether the consent principle and the *Monetary Gold* principle which is an application of that more general principle are applicable to international criminal tribunals in general and to the ICC in particular. I argue that they are. Section 5 examines which States are to be regarded as non-consenting States for the purpose of the application of the consent principle. I then turn to the Nuremberg and Tokyo precedents in Section 6. I argue that the establishment and operation of these tribunals would not support the view that a rule has developed permitting departure from the consent principle in international criminal tribunals. I argue that neither tribunal was truly international and that in any event, in both cases, there was the consent of the relevant sovereign authority. Section 7 considers whether the jurisdiction of the ICC over aggression can be justified on the basis of a transfer of authority from the State that is the alleged victim of aggression. I argue that though victim States can prosecute for aggression and though transferred jurisdiction is an appropriate justification for the jurisdiction of the ICC in general, the principles and precedents which support transfers of jurisdiction to international tribunal do not apply to aggression. Section 8 returns to the Security Council issue and considers whether prior determination by the Council (or by the General Assembly or ICJ) would fall within an exception to the *Monetary Gold* principle. It is argued that the best way to expand the jurisdiction of the Court to non-consenting States is by referral of a situations to the Court by the Council. However, the ultimate justification for such jurisdiction would still be consent. Section 9 is the main theoretical contribution of the piece considering whether the deviation from the consent principle contemplated with regard to the ICC's jurisdiction over aggression is to be regarded as an evolution of the law or instead a violation.

2. The Consent Problem Explained

Since the Statute of the ICC is a treaty, it is only binding on those States that have become party to the treaty. However, in cases where the jurisdiction of the Court is triggered by referral of a situation by the United Nations Security Council, the Statute will be binding on non-State parties.[30] There are other circumstances where the exercise of jurisdiction by the Court may affect the interests of non-State parties, for example where the Court exercises jurisdiction

[30] Akande, "The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", (2009) 7 *JICJ* 333-352.

over nationals, including officials, of States that are not party to the Statute.[31] Such prosecutions are possible where the nationals or officials of non-party States commit crimes within the jurisdiction of the Court on the territory of a State party or in circumstances where the United Nations Security Council refers a situation to the Court.[32]

Questions have been raised in the negotiation of the amendments relating to aggression as to how the amendments will enter into force for States parties and whether or not States parties will need to consent to the amendment specifically in order for the amendment to apply to them.[33] The purpose of this paper is not to seek to resolve the particular debate as to how the amendments should come into force. However, I do agree with Sean Murphy that these debates seem to revolve around what appears to be a very clear provision of the Statute and some of the suggestions take a position which is inconsistent with a plain reading of the text.[34] The question as to the procedure by which any amendment regarding aggression will come into force turns on whether Article 121(4) or Article 121(5) of the ICC Statute should apply. The former provides that "Except as provided in paragraph 5", an amendment shall enter into force for all States Parties one year after seven-eighths of them have ratified or accepted it. This would allow the Statute to become binding on all parties even without the direct consent of that State party. On the other hand, Article 121(5) provides that in the case of amendments to Articles 5-8 (the provisions setting out and defining the crimes), an amendment will enter into force only for those States Parties which have accepted the amendment. The question then is whether provisions setting out a definition of the crime of aggression and the conditions under which the ICC may exercise jurisdiction over the crime are to be regarded as amendments to Articles 5-8. It is likely that the provisions, if adopted, will be included in provisions which are separate from the existing Articles 5-8. However, what is nonetheless clear is that the provisions are, in part, amendments with respect to the definition of the crimes subject to the jurisdiction of the Court. Furthermore, the addition of the definition of the crime of aggression and the conditions for the exercise of jurisdiction will require the deletion of Article 5(2) of the original Statute – the provision which prevents the Court from exercising jurisdiction over aggression pending the entry into force of the amendments.[35] Therefore, the text and spirit of Article 121 suggests that it is paragraph 5 that ought to apply.

The primary purpose of this paper is to seek to address the question whether the provisions relating to aggression can apply to non-consenting States. In the period immediately following the adoption and entry into force of the Statute, the argument was made by the United

[31] Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", (2003) 1 *JICJ* 618, 637 *et seq.*
[32] Art. 12(2) ICC Statute.
[33] See paras. 33-38, of ICC-ASP/8/INF.2, above n7.
[34] See Murphy, above n2, 1149.
[35] Art. 5(2) provides: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

States[36] and by writers in support[37] that the Rome Statute, by purporting to apply to nationals of non-States parties, creates a jurisdiction which violates the sovereign rights of States. This argument is at its strongest when it asserts that the parties to the Rome Statute act illegally when they allow the ICC to exercise jurisdiction over the official acts of non-State parties.[38] In exercising competence over official acts of non-State parties, the Rome Statute, it may be argued, could be in violation of two principles of general international law which may stand in the way of prosecution of nationals of non-consenting States.

First, it may be argued[39] that the Statute violates the principle by which international tribunals are not competent to decide disputes between States except where those States have consented to the exercise of jurisdiction over that dispute by the tribunal.[40] This consent principle of international adjudication ensures that both parties to cases before international tribunals must have accepted the jurisdiction of the tribunal to rule on the case. The principle has also been applied more broadly as the International Court of Justice decided that it is precluded from exercising its jurisdiction where doing so would require adjudication of the legal interests of a third State that was not a party to the case and has not given consent to the Court determining the matter.[41] This is known as the *Monetary Gold* principle. Thus, even where the parties to the dispute before the ICJ have consented to the exercise of jurisdiction, that Court has taken the view that the principle of consent requires it to abstain from deciding a case where the legal interests of a non-consenting third State formed "the very subject matter" of the case. [42]

Secondly, it may be argued that in exercising jurisdiction over the official acts of non-consenting States, the Rome Statute violates the principle that State officials cannot be subject to external jurisdiction in respect of acts which are really acts of the State itself, without the consent of that State.[43] This second principle is reflected in the immunity *ratione materiae* that international law accords to State officials. Although that immunity is generally accorded to States and their officials from the jurisdiction of foreign States, the principle is also relevant here. This is because the source of the ICC's jurisdiction is often regarded as a delegation of State competence by parties to the treaty.[44] States cannot transfer to the ICC a jurisdiction which they do not themselves possess. Further, since immunity *ratione materiae* is a right

[36] See Scheffer, "Letter to the Editors", (2001) 95 *AJIL* 624, 625; Leigh, "The United States and the Statute of Rome", (2001) 95 *AJIL* 124, 126.
[37] See, Wedgwood, "The Irresolution of Rome", (2001) *Law & Contemp. Problems* 193; Morris, "High Crimes and Misconceptions: The ICC and Non-Party States", (2001) *Law & Contemp. Problems* 13.
[38] Wedgwood, *idem*, 199; Morris, *idem*, 14-15, 20-21.
[39] See Morris, *idem*.
[40] On the consent principle, see Amerasinghe, *Jurisdiction of International Tribunals* (2003), Ch. 3.
[41] *Monetary Gold* case *(Italy v. France, United Kingdom & United States)*, (1954) ICJ Rep 19. See also *East Timor* case (*Portugal v. Australia*), (1995) ICJ Rep 90.
[42] *Monetary Gold* case, idem, 33.
[43] For consideration (and rejection of this argument with respect to crimes within the Statute of the ICC as adopted in 1998), see Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", (2003) 1 *JICJ* 618, 637 *et seq.*
[44] See, eg, Morris, above n37.

belonging to the State which the official represents, where that State is not a party to the treaty that seeks to allow for prosecution, this will amount to a deprivation of the rights of that State, through a treaty it has not consented to.[45] This would, of course, contravene the principle in the Vienna Convention that a treaty is not binding on States without their consent [46]

At first glance, the two rules outlined above may be regarded as different in that the former (the principle of consent/*Monetary Gold* principle) applies to international tribunals whereas the latter (immunity of State officials *ratione materiae*) was originally developed with respect to domestic courts. However, there is actually a close relationship between the two rules. In the first place, both rules reflect the necessity of consent of States before disputes involving those states are subjected to international adjudication or dispute settlement. Secondly, both rules are derived from the same general principle of international law, the principles of sovereign equality and independence.[47] Both rules reflect the idea, which is fundamental to international law as currently conceived, that States are not, in principle, subject to the legal authority of other States – at least when States act in the exercise of their sovereign authority. Furthermore, the principle of independence also means that States are not subject to external obligations or imposition of external authority unless the State has accepted those obligations. Since international organizations and international tribunals are creations of other States, to accept that such organizations or tribunals can exercise authority over States that have not consented to the exercise of such authority would be a violation not only of the principle of independence but also that of sovereign authority.

The relationship between these two apparently separate rules has been recognised by James Crawford, who stated that:

> although the international law rule prohibiting adjudication against foreign States without their consent may not apply directly to municipal courts, it has much force as an analogy, with respect to matters that it covers.[48]

According to Crawford, the rule requiring State consent for international adjudication "provides strong support by analogy, if not directly, for a rule of foreign State immunity in the rather limited areas governed by that jurisdictional rule."[49] Thus the immunity *ratione materiae*[50] principle in domestic law is really a reflection of the consent based dispute settlement principle in international law and is similar to principle that is reflected with respect to international tribunals.

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[45] Akande, "International Law Immunities and the International Criminal Court", (2004) 98 *AJIL* 407.
[46] Art. 34, Vienna Convention on the Law of Treaties (1969) 1155 *UNTS* 331.
[47] On sovereign equality, see Warbrick, "The Principle of Sovereign Equality", in Warbrick and Lowe (eds.) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*, (1994) 204.
[48] Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", (1983) 53 *BYIL* 75, 80-81.
[49] *Idem*., 81.
[50] Crawford states that the international dispute settlement rule is most coherently treated as an immunity *ratione personae* of foreign States from adjudicatory jurisdiction, id. 82. However, I would suggest that the rule is better translated in domestic law as a subject matter immunity. This is because it is acknowledged, even by Crawford, that the rule does not bar all suits against foreign States, only suits that cover a certain subject matter.

It has been stated by a leading authority that it is a "truism that international judicial jurisdiction is based on and derives from the consent of States."[51] All international tribunals which exercise competence over disputes involving States require the consent of those States. The manner in which consent may be given varies. Limited c onsent may be given with respect to the particular dispute in question.[52] Alternatively, a more general form of consent may be given, for example, consent to the exercise of jurisdiction by a tribunal over any dispute arising under a particular treaty or treaties. Even more broad is acceptance of the so called "compulsory jurisdiction" of the International Court of Justice.[53] Where the compulsory jurisdiction of the ICJ is accepted, consent is not limited to particular disputes or treaties but relates to disputes involving that State with any other State that has accepted the same obligation.

In the *Monetary* Gold case[54], the International Court of Justice held that the principle requiring the consent of a State before an international tribunal can adjudicate on the rights or responsibilities of that State applies even where the State concerned is not a party to the case before the Court but where the legal interests of that State would form the very subject matter of the decision. That case involved a dispute between Italy on the one hand and the United States, United Kingdom and France on the other. The case involved gold, belonging to Albania, which was held in Italy during World War II and which had been removed by Germany during the war. The issue was whether Italy was entitled to receive the gold and whether it had priority over the UK's claim to ownership. Italy claimed the gold as compensation for wrongs done to Italian nationals by Albania. The ICJ held that though the parties to the case had conferred jurisdiction on the Court, it was unable to exercise that jurisdiction since "it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation."[55] The Court held that "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[56]

The ICJ applied the *Monetary Gold* case in the *East Timor* case,[57] which has significance for the ICC's jurisdiction over aggression because the ICJ abstained from determining a case

[51] Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989 (Part Nine)", (1998) 69 *BYIL* 1, 4.
[52] For example, Art. 36(1), Statute of the ICJ.
[53] See Art. 36(2), Statute of the ICJ. Consent is regarded as so important within the context of the ICJ that States are entitled to restrict the general scope of jurisdiction of the Court by entering reservations to the declarations they make accepting the Court's compulsory jurisdiction. Other international courts that operate a similar system by which States make declarations accepting the jurisdiction of the court have not accepted that States making such a declaration can restrict their general consent by making reservations. See also *Loizidou v. Turkey* (1995) 20 EHRR 99.
[54] Above n41, 32.
[55] *Idem*.
[56] *Idem*.
[57] *Idem.*, 90.

where, according to the Court, it would have had to pronounce on use of force by a non-consenting third State. In that case, Portugal claimed that Australia's act in entering into a Treaty with Indonesia with respect to resources of an area of the continental off the coast of East Timor was contrary to the right of self-determination of the people of East Timor. Portugal claimed it was acting as administering authority of East Timor despite the fact that it had withdrawn its administration from East Timor in 1975 and that Indonesia had occupied the territory since that time, subsequently incorporating it into its own national territory. In refusing to decide the case, the Court held that:

> the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty- making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgement made in the absence of that State's consent.[58]

3. Will the Aggression Amendment Require the ICC to Violate the Principle of Consent?

The essence of the *Monetary Gold* ruling is that the consent principle applies even in cases where the relevant State is not a party to the proceedings. The ICJ's ruling indicates that an international court should not decide a case in which the court has to make a determination, as a necessary prerequisite to determining the claims before it, on the rights or responsibilities of a State that has not consented to the exercise of jurisdiction. Questions arise as to whether the rule identified in that decision is one which is specific to the ICJ or whether it is a principle of more general applicability which ought to be respected by all international tribunals. Before considering that issue, it is important to return to the question whether the consent principle would, even if it applied to the ICC, be violated by the exercise of jurisdiction by that court over officials of non-consenting States.

In an article published in 2003, I argued that:

> Even if one assumes that the *Monetary Gold* doctrine applies to all international law tribunals, it will not, in most cases, be violated by the exercise of jurisdiction by the ICC over non-parties nationals in respect of official acts done pursuant to the policy of that non-party. It is important to note that the *Monetary Gold* doctrine does not prevent adjudication over a case simply because that case implicates the interests of non-consenting third parties. Furthermore, there is nothing in the doctrine which requires abstention in any case that may cast doubt on the legality of actions of third States or imply the legal responsibility of those States. As the ICJ noted in the *Monetary Gold* case, the doctrine only applies in cases in which the "legal interests [of a non-consenting third State] would not only be affected by a decision, but would form the very subject matter of the decision." Thus, the doctrine only requires abstention in cases in which the court is required to pronounce upon the rights and responsibilities of the third State in order to decide the case before it.[59]

This conclusion was reached because the ICC will not be engaged in making determinations about a State's legal responsibility, nor will it need to do so, in order to convict an individual for

[58] *Idem.*, 105.
[59] Akande, above n31, 635 (footnotes omitted).

war crimes, crimes against humanity or genocide.[60] However, the position is different with respect to aggression. In 2003, I noted that, depending on the definition of aggression adopted in the ICC Statute, the principle of consent (as reflected in the *Monetary Gold* case) may be implicated more cogently than in the Rome Statute adopted in 1998.[61] The time is now ripe to re-examine this issue given that we now have some consensus on the definition of the crime of aggression. Indeed it is essential that parties to the ICC Statute and other States engage with these fundamental questions regarding the application of the consent principle to the ICC. This question is fundamental because, as will be seen below, the consent principle is regarded as flowing from the general principle of State independence which is one of the organising principles of international society of States as currently constituted. A conferral by States parties to the ICC of a jurisdiction on the Court which requires the Court to adjudicate the legal responsibilities of non-consenting States may signal a significant change in the approach of States towards the application of the principle of independence and towards the authority of international tribunals (and indeed other States) over States. There would be a significant chink in the long standing principle that States are free from the exercise of external authority without the consent of that State.

The definition of the aggression adopted in draft Article 8*bis* prepared by the Working Group on the Crime of Aggression states that:

> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations....[62]

While the first paragraph of this definition makes clear that the crime of aggression is restricted to leaders of States, the effect of the first and second paragraphs is that the ICC may not convict a State leader of the crime of aggression unless it has been proved that the State in question had planned or committed an act of aggression. Indeed, the Elements of the Crime of aggression proposed by the Working Group would make it clear that the act of aggression must actually have been committed, thus eliminating cases of attempted aggression.[63] Thus, a *prerequisite* to the conviction of a State leader for the crime of aggression is a determination that a relevant State unlawfully used force in a manner inconsistent with the Charter of the United Nations. This means that the ICC, in cases of

[60] Nevertheless, inferences of state responsibility will often flow from fact that an official of the State has committed an international crime. See Arts. 4 & 7 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001).
[61] Akande, above n31, 637.
[62] *Report of the Special Working Group on Aggression,* above n12.
[63] See Element 3, Annex I, ICC-ASP/8/INF.2 (10 July 2009), above n9.

aggression, is not only called upon to determine individual criminal responsibility but is also being asked to make determinations of State responsibility under the law relating to the use of force. For the Court to make these determinations, it would need to consider the conduct of the relevant States and would have to take into account whether the alleged aggressor State had any available defences under international law since there can be no illegality of the use of force where there is an available defence.[64] Thus, the Court will in all probability be called upon to determine whether or not a given use of force is in conformity with the principles of self defence (the most commonly argued justification for external uses of force). This would then mean that the ICC may not only be required to determine the responsibility of alleged aggressor State for an unlawful use of force, but also whether the alleged victim State had itself committed an armed attack against the alleged aggressor State which could justify a response in self defence. The Court would thus find itself acting in a manner which was practically no different to determining an inter-State dispute.

The fact that the determination of state responsibility by the ICC is a prerequisite to determination of individual liability immediately implicates the principle of consent in cases where the State that is alleged to have committed the act of aggression is not a party to the ICC, or has not accepted the jurisdiction of the ICC with respect to aggression. The situation would fall precisely within the scenario envisaged by the ICJ in the *Nauru Phosphates case*[65] where the ICJ explained that the *Monetary Gold* principle only applies where the Court has to determine the responsibility of a non-consenting State as a *prerequisite* to determining the claims placed before it. In the case of ICC jurisdiction over aggression by a non-consenting State, the only way in which the ICC may convict for aggression is first to decide on State responsibility and then on individual responsibility. In such cases involving non-consenting States, the ICC would be acting contrary to the consent principle.

Surprisingly, this conflict with the principle of consent appears not to have been raised at all in the course of the negotiations concerning aggression. Perhaps there is an assumption that the consent principle does not apply to the ICC. Conceivably, this assumption could be supported on one of two grounds: either a) because the *Monetary Gold* consent principle applies exclusively to the International Court of Justice; or b) because it applies only to inter-State cases. Both of these arguments are wrong.

4. Do the Consent and Monetary Gold Principles Apply to the ICC?

It is beyond doubt that an international tribunal cannot exercise direct jurisdiction over a State by entertaining a case in which the State is said to be party, without the consent of that

[64] See Johnson, "YJIL Online Symposium: Second Response to Michael Glennon", *Opinio Juris Blog* (March 1, 2010) http://opiniojuris.org/2010/03/01/yjil-online-symposium-second-response-to-michael-glennon/ [last accessed 27 May 2010].
[65] (1990) ICJ Rep 240, 261.

State.[66] There are no examples of international tribunals purporting to exercise a direct jurisdiction over a State (by making it party to proceedings and subject to its decision) without the consent of the State in question. Thus, the question left for consideration is whether the *Monetary Gold* principle (which simply applies the consent principle in such a manner that international tribunals are barred even from exercising indirect jurisdiction over non-consenting States not party to the proceedings) is generally applicable to all international tribunals, and in any event, to the ICC.

One may begin consideration of this question by noting that as a matter of practice, international tribunals other than the ICJ have applied the *Monetary Gold* consent principle. These tribunals seem to have taken the view that the principle is generally applicable to international tribunals (i.e. tribunals operating within the system of public international law). In *Larsen v. Hawaiian Kingdom*,[67] an international arbitral tribunal conducted under the auspices of the Permanent Court of Arbitration and composed of very eminent international lawyers (Prof. James Crawford, Dr Gavan Griffith and Prof. Christopher Greenwood) applied the principle that "an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a State which is not a party to the proceedings."[68] That tribunal considered and rejected the argument that the *Monetary Gold* principle was applicable only to the ICJ. According to the tribunal, the rule stated by the ICJ:

> applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.[69]

Therefore, in that case, the tribunal was unable to determine the case submitted to it by the parties as adjudication of the claims submitted would have required a determination of whether the United States of America had and was acting in breach of international law.

The *Monetary Gold* principle has also been referred to in approving terms by a dispute settlement panel of the World Trade Organization. In *Turkey – Restrictions on Imports of Textiles and Clothing Productions,*[70] Turkey argued that the case ought to be dismissed because the claims by India were directed only against Turkey but the trade measures at

[66] See Amerasinghe, above n40, 70 stating that the "jurisdiction [of international tribunals] in contentious matters certainly, whether they are *ad hoc* tribunals, long standing *ad hoc* tribunals, such as the Iran-US Claims Tribunal or Claims Commissions, or established or standing courts, such as the ICJ or ITLOS, is based on the consent of the States which are generally parties to the dispute, or have through consent in some form with the establishment of the tribunal and the formulation of its jurisdiction . . ." See also Thirlway, above n51, 4 stating that international tribunals "can only address States in the imperative mood in so far as they have agreed in advance that it shall."

[67] 119 ILR 566 (2001); also available at http://www.pca-cpa.org/upload/files/LHKAward.PDF.

[68] *Idem.,* para. 11.8.

[69] *Ibid*., para. 11.16.

[70] See *Turkey-Restrictions on Imports of Textiles and Clothing Productions*, 31 May 1999, WT/DS34/R (WTO).

issue were taken pursuant to a regional trade agreement between Turkey and the European Communities, and according to Turkey, the European Communities should also have been made a party to the case. The panel cited and followed the jurisprudence of the ICJ with regard to absent third parties and rejected Turkey's claim on this point. According to the Panel:

> The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement[71]

Thus, the Panel applied the Monetary Gold case *a contrario*.

The International Law Commission (ILC) has also considered the rule stated in the *Monetary Gold* case to be of general application to international tribunals. The ILC in its commentary to Article 16 of its Articles on State Responsibility (dealing with complicity for wrongful acts) noted that the *Monetary Gold* principle may make it difficult to establish, in judicial proceedings, the complicity of one State in wrongful conduct committed by another. The ILC did not confine itself to proceedings in the ICJ and even stated that "the *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings".[72] The view that the principle is of general application has also been expressed by commentators. Talmon, for example, states that the "the *Monetary Gold* principle or 'indispensable third party rule' is a procedural barrier to the admissibility of a claim before an international court or tribunal. It arises because such judicial bodies cannot determine the responsibility of a State not party to the proceedings."[73] Also, Crawford derives from the *Monetary Gold* case, "the rule that a State cannot be required to submit to international adjudication without its consent."[74]

It is worth recalling that in the *Monetary Gold* case, the ICJ was of the view that "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[75] This formulation suggests that the Court regarded the principle at stake as being generally applicable. What else would it mean to say that the principle applied by the Court was "a well established principle of international law"? The ICJ's statement in *Monetary Gold* recalls the earlier and clearly more general statement of the Permanent Court of International Justice (PCIJ) in the *Eastern Carelia Advisory Opinion* where it was stated that: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States

[71] *Idem.,* para. 9.10 with citations to the Monetary Gold, East Timor, Nicaragua and Nauru Phosphate cases of the ICJ.
[72] Para. 11 ILC Commentary to Art. 16, (2001) *Yearbook of the International Law Commission,* vol II (Part Two).
[73] Talmon, "A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq", in Shiner & Williams (eds.) *The Iraq War and International Law* (2008).
[74] Crawford, above n48, 80.
[75] Above n41, p. 32.

either to mediation or to arbitration, or to any other kind of pacific settlement."[76] Indeed, the Court has even gone further and in the *Western Sahara Advisory Opinion* referred to "the *fundamental rule*, repeatedly reaffirmed in the Court's jurisprudence, that a State cannot without its consent, be compelled to submit its disputes with other States to the Court's adjudication."[77] Moreover, in the *Eastern Carelia* case, the PCIJ linked the consent principle to "a fundamental principle of international law, namely, the principle of the independence of States."[78] It is the fundamental nature of the consent rule which suggests that adjudication without consent cannot occur even in cases where the State whose rights or obligations are being adjudicated upon is not a party to the case.[79]

Thus, the way in which the ICJ and PCIJ have stated the *Monetary Gold* principle has clarified that they do not regard that application of the consent principle to be limited to the ICJ but instead regard it as applicable to other forms of peaceful settlement of disputes and certainly to international tribunals in general.[80] Rosenne, perhaps the leading writer on the ICJ, has stated that:

> The existence of this limitation on the Court's jurisdiction following from the absence from the litigation of essential parties, as a principle of general international law and as a feature of the law of international judicial procedure, is not open to question [81]

The consent principle means that States are not subject to the adjudicatory authority of international tribunals unless they have agreed to make themselves subject to such an authority. In the present state of international law, independence is a key attribute of Statehood and the consent principle reflects the independence of States. It may be asserted that the consent principle relates to attempts to settle disputes involving a State and that the principle should be confined to contentious or inter-State cases or even to inter-State disputes. On this view, the principle would not be applicable to an international criminal tribunal which, after all, does not have the goal of settling a dispute between States but rather is concerned with individual responsibility. However, both the PCIJ and the ICJ have confirmed that the principle does not apply only in inter-State cases since the consent principle has been stated to be applicable in advisory opinions.

The principle was indeed applied in the *Eastern Carelia Advisory Opinion* where the PCIJ declined to render an opinion requested by the Council of the League of Nations on the ground that the "opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia"[82] and Russia (which was neither a party to the Covenant

[76] *Status of Eastern Carelia Advisory Opinion*, No. 5, 1923, 27.
[77] *Western Sahara Advisory Opinion* (1975) ICJ Rep 12, 23.
[78] *Status of Eastern Carelia*, above n76, 27.
[79] Amerasinghe, above n40, 74.
[80] "It is well established in international law that no State can, without it consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." *Idem.*
[81] Rosenne, *The Law and Practice of the International Court 1920-2005* , Vol II (2006) 546.
[82] Above n76, 27.

of the League or the Statute of the Court) had not given its consent to the League or the Court deciding on the question. The Court stated that it was:

> aware of the fact that it is not requested to decide a dispute but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[83]

However, it must be admitted that the *Eastern Carelia* case appears to be the high point of the application of this principle with respect to advisory opinions. The principle has never been reversed by the ICJ with respect to advisory opinions, and indeed it has been cited with approval on a number of occasions by that Court. For example, in the *Western Sahara* Advisory Opinion, the ICJ stated that:

> "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[84]

However, despite approval of the principle in general terms, the ICJ has never denied a request for an advisory opinion from that Court on grounds of lack of consent by a State or States. This is despite the fact that many advisory opinions delivered by the Court have dealt with disputes between States or at any rate between States and the United Nations. Or at least in the course of delivering advisory opinions, the ICJ has pronounced on the obligations or responsibilities of specific States. In the first case in which that Court had an opportunity to consider the application of the consent principle to advisory opinions, it appeared to reject the *Eastern Carelia* precedent (without saying so expressly). In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*,[85] the Court distinguished between contentious cases and advisory proceedings, even when those proceedings relate to a legal question actually pending between States, and appeared to confine the consent principle to the former. It held that, since advisory opinions have no binding force, no State (whether a member of the UN or not) could prevent the giving of an advisory opinion which the UN considers would assist it the fulfilment of its functions. Although the Court did not overrule the *Eastern Carelia case,* it held that the circumstances of the case before it were "profoundly different". In fact, it is difficult to see what the profound difference was. The difference referred to was that PCIJ was asked to deal with the *merits* of a dispute between States, whereas the ICJ was only asked to determine the *applicability* of certain mechanisms for dispute settlement provided for in the Peace Treaties entered into by the States. This can hardly have been a relevant difference: the ICJ was called upon to determine the obligations of disputing States; it is just that those obligations were procedural in nature. Indeed in the second phase of the *Peace Treaties case*, the Court went on to determine that

[83] *Idem.,* 28-9.
[84] Above n77, 25 para. 33.
[85] (1950) ICJ Rep 65.

the refusal of Bulgaria, Hungary and Romania to appoint arbitrators provided in the Peace Treaties was a breach of their treaty obligations for which they bore international responsibility.[86] This led Hersch Lauterpacht, no less, to comment that "largely on the grounds stated in the Advisory Opinion in the case of the *Peace Treaties*, the Opinion in the case of *Eastern Carelia* can no longer be accepted as expressing fully a valid legal proposition – at least . . . in relation to Members of the United Nations."[87]

In subsequent cases, the ICJ has pulled back from its decision in the *Peace Treaties case*, though without expressly saying so. In later cases where it has been argued that rendering an advisory opinion would amount to the determination of a dispute between States (or between a State and the United Nations) without the consent of a relevant State, the Court has accepted that State consent is an important issue to be considered by the Court even in advisory proceedings. The issue of consent was raised and dealt with the Court in the *Namibia Advisory Opinion*,[88] the *Western Sahara Advisory Opinion*,[89] the *Privileges and Immunities Convention Opinion* (the *Mazilu case*)[90] and in the *Legal Consequences of the Israeli Wall in Palestine Case*.[91] The question whether the Court may render an opinion which would require it to pronounce on an existing dispute between States or on the right or obligations of States, without the consent of the relevant State, has been regarded as going not to the competence of the Court (which relates to whether the request comes within the criteria stated within the Charter (Art. 96) and Statute (Art. 65)[92]) but rather to the propriety of the exercise of the advisory jurisdiction. In the *Western Sahara opinion*, the Court stated that:

> lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.[93]

This holding has been reaffirmed in subsequent advisory opinions.[94]

Although the consent principle is regarded as a matter of propriety, or indeed of discretion, in the context of advisory opinions,[95] this should not detract from its importance. Viewing the

[86] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, (1950) ICJ Rep 221, 228.
[87] Lauterpacht, *The Development of International Law by the International Court* (1958) 356.
[88] (1971) ICJ Rep 12, 23-7.
[89] Above n77, 21-7.
[90] (1989) ICJ Rep 177,188-92.
[91] (2004) ICJ Rep 136, 156-62.
[92] Frowein & Oellers-Frahm, "Article 65" in Zimmerman, Tomuschat & Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2006) 1406-1410.
[93] (1975) ICJ Rep 25, para. 32-33. See also the *Wall Advisory Opinion*, above n91, 157-8, para. 47.
[94] *Wall Advisory Opinion, idem*.

consent principle as discretionary in the context of advisory opinions does not mean the principle itself is one which may be exercised on a discretionary basis. Rather, the better view is that although the consent principle is not explicitly stated in the Charter and Statute with regard to advisory opinions, the discretion that the Court has to render or refuse advisory opinions (a discretion flowing from the wording of Article 65 of the Statute, which says that the Court "may" render advisory opinions) *is simply the vehicle* by which the Court respects the consent principle. The principle is no less fundamental because it is respected through a discretionary power of the Court. Indeed, the Court has said that it would refuse to render an opinion that seeks to circumvent the consent principle because to do so would not only be improper but would also be incompatible with "the Court's judicial character."[96] Clearly, the Court is bound not to act in a manner that is contrary to judicial propriety or to its judicial character. In that sense, though implemented through the exercise of a discretionary power, the Court is no less bound to apply the consent principle in advisory opinions.

Although the ICJ has repeatedly reaffirmed the consent principle in the context of advisory opinions, it has never declined to render an advisory opinion on this ground. In subsequent cases, the Court has stressed that it is an organ of the United Nations and maintained that the rendering of advisory opinions requested by UN organs "represents its participation in the activities of the Organization and, in principle, should not be refused."[97] In all these cases, the ICJ has stated that the UN organ requesting the opinion is in need of legal advice with regard to the fulfilment of that organ's functions under the Charter.[98] The Court's view is that the disputes at stake in these opinions were not simply bilateral disputes between States or between a State and the UN, but rather matters which fell to be considered in a broader framework of the UN.[99] As the Court stated in the *Wall Advisory Opinion*:[100]

Amerasinghe has argued that "because the [consent] principle relates to an inherent aspect of the judicial function, even though it is opinions that are given and not judgments in contentious case, . . . it should properly be regarded as a matter pertinent to competence." He goes further and argues that "there is support [in some of the ICJ's advisory opinions] for treating the matter as one of *competence* and not as one pertaining to the Court's general discretionary authority to give advisory opinions, in spite of the *Peace Treaties Opinion* and the *Western Sahara Opinion* in which it unequivocally treated as one pertaining to the Court's discretionary authority." Amerasinghe, above n40, 529. Despite this argument, the weight of the ICJ's case law and its latest expression in the *Wall Advisory Opinion* regards the consent principle as going to discretion and not competence. However, viewing the principle as one going to the ICJ's discretion and competence simply means that the Court has jurisdiction over the case under its Statute. In other words, the Statute and Charter confer competence on the Court with regard to the opinion.

[96] *Idem*.
[97] *Western Sahara Opinion* above n77, 21, para. 23.
[98] See Higgins, "A Comment on The Current Health of Advisory Opinions", in Lowe & Fitzmaurice, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 567, 571.
[99] Frowein & Oellers-Frahm, "Article 65" in Zimmerman, Tomuschat & Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2006) 1412-13.
[100] Above n91, 159, para. 50.

> The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

Despite the fact that the ICJ has not declined to render an advisory opinion on the grounds of the principle of consent, that principle nevertheless remains at work even in advisory opinion in which the ICJ has rendered an opinion involving a dispute between States. The key difference which differentiates the ICJ cases from the *Eastern Carelia* case of the PCJI is that the latter involved a State (Russia) which was not only not party to the Statute of the PCIJ, but also not a member of the League of Nations which had referred the matter. In the ICJ cases (with the exception of the *Peace Treaties case*), the States involved in the dispute which was the subject of the advisory opinion were parties to the Statute of the ICJ and of the Charter of the UN. They had therefore not only given their consent (indirectly) to the UN's competence over the matter but had also accepted the advisory procedure of the Court. Therefore, they are not in reality to be regarded as non-consenting States. This point was emphasised by the ICJ in the *Western Sahara case* with respect to Spain (the State objecting to the rendering of the opinion). Distinguishing the *Eastern Carelia* case, the Court stated that:

> In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers.[101]

Taking this last point into account, one sees that, in the end, the principle of consent underlies the exercise of the advisory jurisdiction of the ICJ. Therefore, statements to the effect that the *Eastern Carelia* no longer reflects good law[102] or that it does not stand for a general principle of consent with respect to advisory opinions,[103] require clarification and qualification. Indeed, the authors who make these statements do qualify them by expressing that the principle in the *Eastern Carelia* case is not likely to be applied with respect to a UN member, but would remain applicable with respect to a non-consenting non-member State of the UN.[104] The reason for this qualification is that member States have given their consent to the advisory procedure and therefore the principle of consent is not violated, but is in fact respected with respect to opinions involving such member States.

The point of this rather lengthy examination of the application of the consent principle, as it applies in non-contentious cases which do not involve an inter-State proceedings, was to consider whether the Monetary Gold manifestation of the principle of consent only applies

[101] Above n77, 24, para. 30. See also the *Namibia Advisory Opinion,* above n88, 23-4, para. 31.
[102] Lauterpacht, above n87, 354, 356.
[103] Pomerance, *The Advisory Function of the International Court in the League and U. N. Eras* (1973) 287-9 [Eastern Carelia case does not embrace a general principle of consent but stands for a narrower proposition].
[104] See Lauterpacht, above n87, 356-7; Pomerance, above n103, 296, note 61.

where the judicial proceedings in question arise in an inter-State context. As it has been seen, this is not the case. The bar on judicial determination by international tribunals of the rights of non-consenting States applies to all international tribunals, i.e. those operating under public international law, and applies even in cases in which determination of the rights or responsibilities of the non-consenting State would take place outside the context of a contentious case between other States.

The applicability of the principle to international criminal tribunals was accepted by Hans Kelsen when he criticised the Allied Powers for establishing the Nuremberg Tribunal without the consent of the State whose actions were to be judged.[105] Likewise, Judge Tomka in his Separate Opinion in the *Genocide Convention case*, [106] appears to have been contemplated that the principle applies to international criminal tribunals. When speaking of the duality of responsibility with regard to international crimes, Judge Tomka noted that the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) have different missions but a common object with regard to cases involving genocide. He stated that:

> The ICTY has to determine the personal guilt and individual criminal responsibility of those indicted for the crime of genocide, crimes against humanity and war crimes. It has no jurisdiction over States as such and thus cannot make any pronouncement on the responsibility of States for the many serious atrocities committed during the Balkan wars since 1991.[107]

Indeed, it can hardly matter what form the judicial proceedings take for the *Monetary Gold*/*Eastern Carelia* consent rule to apply. By definition, the rule applies to cases where the non-consenting State is not a party. The way in which the parties to the case or those who set up the tribunal structure the proceedings cannot and ought not to affect the rights of the non-consenting party. The point is not whether the non-consenting State will be bound as a formal matter by the decision in the case. In all cases, the non-consenting State is not bound since it is not a party to the proceedings. Article 59 of the Statute of the ICJ makes this clear as far as that Court is concerned.[108] However, despite the fact that the decision is not binding on the non-consenting State, the reason the judicial tribunal stays its hand under the consent principle is because it is deciding a case that will affect the legal interests of the non-consenting State. Furthermore, the judicial tribunal's decision may well have practical effects for the State concerned because the decision will be seen as a statement by an authoritative decision maker on the rights or responsibilities of the non-consenting State.

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[105] Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" (1947) reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008), 274 at 287: "If, however, a tribunal is instituted to make individuals criminally responsible for their State's violation of a treaty, it is not exactly an improvement of general international law to establish the tribunal without the consent of the State accused of the treaty violation."

[106] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits), (2007) ICJ Rep Separate Opinion of Judge Tomka, para. 73.

[107] *Idem*.

[108] Art. 59 of the ICJ Statute states that: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Thus, in principle, the consent principle applies to the ICC as it does to other international tribunals. Were the ICC to make judicial determinations on the legal responsibilities of non-consenting States with respect to the use of force and aggression, this would violate the *Monetary Gold* principle. It hardly matters that the ICC makes this determination in criminal proceedings. What is important is that it is making legal determinations about the breach by States of their legal obligations. Moreso, it will be making those findings in the context of judicial proceedings which would carry the moral weight of an application of the law by a dispassionate and authoritative body. It is inevitable that a finding of aggression by the ICC will result in significant pressure on the State concerned, and that the State would subsequently face an uphill battle in arguing that its use of force was not unlawful under international law. The finding of illegality would have been made without the participation of that State in the proceedings thus suggesting a violation of the principle that all sides of a dispute ought to be heard. It is no response to say that the State can intervene in the proceedings in order to put its case because the suggestion would simply be an admission that the proceedings do impose, in a real sense, obligations on the State to participate and protect its interests – when it has not consented to those obligations. The consent principle is important because it serves to protect that imposition of obligation on States by other States or by other bodies. Thus the principle operates both at the substantive level and at the procedural level. Application of the *Monetary Gold* consent principle to the ICC in the case of aggression is even more compelling because the ICC will not only be affecting the independence of the State in theoretical terms but will be making a legal determination on the responsibility of the State in order to affect (i.e punish) the leadership or former leadership of the State, thus affecting the State's interests in a very practical way.

5. Which States are non-consenting States?

It is clear that non-States parties to the ICC Statute are non-consenting States for the purposes of the *Monetary Gold* principle.[109] It is less clear whether a State party to the Rome Statute that has not accepted the aggression amendment should be regarded as a non-consenting State. The answer to this question will turn on the way in which the aggression amendment is brought into force. I have suggested above[110] that it is Article 121(5) – which provides that amendments to which it relates will enter into force only for those States which accept the amendment – that ought to apply to the aggression amendments. If this is accepted then States Parties that do not ratify or accept the amendment should also be considered as non-consenting States. This is because the consent given by those States to the Statute in general cannot be regarded as consent to the exercise of jurisdiction over the crime of aggression. The situation would be similar to the position in the ICJ where States parties to the Statute of that Court may not necessarily have accepted the jurisdiction of the Court for the purposes of each particular case. In the absence of specific consent to the

[109] Unless those non-parties make a declaration accepting the jurisdiction of the Court under Art. 12(3) of the ICC Statute.
[110] See Section 2 above.

adjudication by the ICJ of that particular dispute, they are regarded as non-consenting States for the purposes of the *Monetary Gold* principle.[111] The position is even clearer under the Rome Statute because of the second sentence of Article 121(5), which provides that

"In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

There has been much discussion within the Working Group on aggression of the meaning to be given to this sentence and its effect on the jurisdiction of the Court.[112] The discussion has focussed on whether the ICC would have jurisdiction over the crime of aggression when committed by a State Party that has *not* accepted the aggression amendment, but on the territory of a State Party that *has* accepted that amendment. As explained above, the Statute provides for ICC jurisdiction where a crime is committed either by a national of a State party or on the territory of a State Party.[113] This would ordinarily mean that the Court would have jurisdiction over the crime of aggression committed on the territory of a State Party that has accepted the provisions relating to that crime, even where the crime is committed by the national of a State that is not a party to the Statute or has not accepted the aggression amendment. However, a literal reading of the second sentence of Article 121(5) suggests that the ICC would not have jurisdiction with respect to aggression committed against a State Party (i.e. on its territory) in a case where the crime was committed by a national of a State Party that has not accepted the amendment. On this view, the second sentence of Article 121(5) modifies the normal jurisdictional provisions of the ICC Statute when the Court is exercising jurisdiction over a new or amended crime. Since the second sentence of Article 121(5) only applies to cases involving State Parties who have not accepted an amendment, and since there is no equivalent provision for non-parties, the view of Article 121(5) just mentioned might appear to privilege States Parties who do not accept amendments over non-parties. Such a conclusion has been regarded as untenable by non-parties as well as by some States Parties[114] – though for differing reasons.

Some States take the view that it would be unfair if the Statute conferred jurisdiction over nationals of non-parties with respect to new crimes while exempting non-consenting States Parties. Attempts have been made to introduce language which would clarify that: "It is understood that article 121, paragraph 5, second sentence of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment."[115] However, some State parties take the view that Article 121(5) should not be read as preventing the operation of the normal jurisdictional rules of the ICC. In their view, territoriality and nationality should continue to be alternative bases for jurisdiction even with respect to new or amended crimes, with the effect that the ICC would have jurisdiction over the crime of aggression if committed on the territory of a State party that

[111] For example, in the *East Timor* case (Portugal v. Australia) 1995 ICJ Rep 90, Indonesia was a party to the Statute but had not accepted the jurisdiction of the Court with respect to the dispute in question.
[112] *Report of the Special Working Group on Aggression,* above n1, paras. 31-7.
[113] Art. 12, ICC Statute.
[114] See *Report of the Special Working Group on Aggression,* above n1, paras. 34-7.
[115] *Report of the Special Working Group on Aggression,* above n1, para. 36 (underlining in original).

has accepted the aggression amendment (even if committed by a non-State party or by a State party that has not accepted the amendment).[116]

The lack of clarity in the second sentence of Article 121(5) is unfortunate. The problems generated by that provision are in all probability attributable to sloppy drafting. It is doubtful that the intention behind the second sentence of Art. 121(5) was (i) to change the normal jurisdictional rules for the ICC; and/or (ii) to make a distinction between the effect of the Statute on nationals of non-party States and nationals of State parties that do not accept amendments. One way of reading the sentence in a manner consistent with the ordinary jurisdictional provisions of the Statute is that the fact that a crime was committed by a national of a State Party that has not accepted an amendment, or on the territory of such a State shall not confer jurisdiction on the Court. This would then mean that it may be possible to have jurisdiction over that same act or person on some other basis. It may be argued that such an interpretation makes the second sentence of Article 121(5) redundant. However, on the contrary, this interpretation has the effect of clarifying an otherwise highly ambiguous and unsatisfactory position.

Whatever view is taken of the interpretation of the second sentence of Article 121(5), one thing is clear: a party that does not accept an amendment to which the provision relates does not consent to the exercise of jurisdiction by the Court over that crime. Even if the Court were to possess jurisdiction over the crime (by adopting the interpretation suggested in the previous paragraph), that jurisdiction would not derive from the consent of the State that has failed to accept the amendment but rather from the consent of some other State (viz the State on whose territory the crime was committed).

6. The Nuremberg and Tokyo Precedents

If the amendments to the ICC Statute regarding aggression are adopted, the ICC will not be the first tribunal to prosecute the crime of aggression. The Nuremberg and Tokyo tribunals established after World War II both exercised jurisdiction with respect to "crimes against peace".[117] Both tribunals convicted German and Japanese leaders for this crime. The question may therefore be asked whether or not post-WWII cases provide sufficient precedent for arguing that the principle of consent does not bar an international criminal tribunal from

[116] These States introduced language that would stipulate that: "It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment." See *Report of the Special Working Group on Aggression,* above n1, para. 35 (underlining in original).

[117] See Art. 6(a) of the Charter of the International Military Tribunal (1945), (1945) 39 AJIL Supplment 258; and Art. 5(a) of the Charter of the International Military Tribunal for the Far East, Boister & Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgments*, (2008), 7. Allied Control Council Law No. 10 (20 Dec. 1945) also provided for prosecutions for crimes against peace and some of the tribunals established on the basis of this law prosecuted for aggression, see Cassese, "On Some Problematical Aspects of the Crime of Aggression", 841, 842, n2.

prosecuting for aggression. After all, both the Nuremberg and Tokyo tribunals made determinations that Germany and Japan had waged aggressive wars. For it to be successfully argued that the Nuremberg and Tokyo Tribunals provide precedents that the *Monetary Gold* consent principle will not bar prosecutions by the ICC for aggression, two points will need to be shown. First of all, it will have to be shown that the Nuremburg and Tokyo Tribunals were international tribunals, properly so called, to which the *Monetary Gold* consent principle applies. Secondly it would have to be shown that the prosecutions by both of those tribunals took place without the consent of the relevant States, i.e. Germany and Japan.

The precedential value, or more accurately the lack thereof, of the Tokyo Tribunal is much easier to determine than that of the Nuremberg Tribunal. It is doubtful that a positive answer can be given to either of the two points mentioned at the end of the previous paragraph, with regard to the Tokyo tribunal. Although that Tribunal was styled an "International Military Tribunal", it was not in fact established by Treaty or by any other instrument under international law. Rather, the Tribunal was established by General MacArthur acting as Supreme Allied Commander for the Allied War Powers.[118] In making the proclamation establishing the tribunal, General MacArthur noted that Japanese Instrument of Surrender subjected the authority of the Japanese Emperor and Government to rule Japan to the Supreme Commander for Allied Powers and also noted that the Allied Powers had authorised him to take steps to effectuate Japanese surrender. He expressly stated that the establishment of the Tribunal was carried out by virtue of that authority conferred on him. From this it appears clear that, as a legal matter, the Tokyo tribunal was established by the powers with supreme domestic authority over the State of Japan, i.e., those States in occupation of Japan, acting through their appointed representative – the Supreme Allied Commander. The tribunal itself recognised this when it stated that: "This is a special tribunal set up by the Supreme Commander under authority conferred upon him by the Allied Powers."[119] The view that the Tribunal acted as a tribunal of the powers occupying Japan is also reflected in the United States Supreme Court decision of *Hirota v. MacArthur*,[120] a case in which that Court had been asked to review the decision of the Tokyo Tribunal on the ground that it was a US military tribunal. The majority of the Supreme Court rejected this argument and held that:

> We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.[121]

[118] Special Proclamation – Establishment of an International Military Tribunal for the Far East (19 January 1946), Boister & Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgments*, (2008), 5.
[119] Judgment of the Majority, Int. Military Tribunal for the Far East, Boister & Cryer (eds), above n118, 71, 79.
[120] 338 US 197 (1948).
[121] *Ibid.*, 197-8.

Boister and Cryer[122] have interpreted the rejection of the tribunal as a US tribunal to mean that it is to be regarded as an international tribunal. However, the fact that the tribunal was not a tribunal of the United States alone does not make it an international tribunal. The tribunal was established by the allied powers with responsibility over Japan but in the exercise of their authority as occupiers of that country and with full responsibility for its governance. As such it is akin to the modern mixed or hybrid tribunals, but the basis of its authority is ultimately to be found in the domestic authority over Japan.

Even if the Tokyo tribunal were to be regarded as an international tribunal, it is nevertheless clear that its exercise of jurisdiction was consented to by Japan. The Japanese Instrument of Surrender[123] accepted the terms of the Potsdam declaration of 1945 by which the allies had stated terms for Japanese surrender. Those terms included the provision that "stern justice shall be meted out to all war criminals".[124] Commentators have accepted that lawfulness of the establishment of the Tokyo Tribunal is ultimately to be found in the Japanese acceptance of the Potsdam Declaration.[125] Since there was actually Japanese consent to the creation of the Tokyo Tribunal and the exercise of jurisdiction by that Tribunal there was no departure from the principle of consent and the Tribunal cannot be used as a precedent for conferring jurisdiction on the ICC with respect to aggression without the consent of the alleged aggressor.

The position with regard to the Nuremberg Tribunal is more complicated. Unlike the Tokyo Tribunal, the Nuremberg Tribunal was created by treaty (the London Agreement of August 1945) between the USA, the UK, the Soviet Union and France.[126] However, there is a lack of agreement as to whether that Tribunal was actually an international tribunal properly so called[127] or whether it was in fact a court created jointly by the Allied Powers acting as the occupiers and indeed, the sovereign authority of Germany after the surrender of the latter.[128] Others have even taken the view that the tribunal had a dual nature and was acting both as an international court, acting on behalf of the international community, as well as an occupation court, exercising jurisdiction on behalf those powers who were exercising the sovereign

[122] Boister and Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), 30.
[123] Boister & Cryer (eds), above n118, 3.
[124] *Idem.*, 1.
[125] Boister and Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), 48; Pritchard, "The International Military Tribunal for the Far East and its Contemporary Resonances: A General Preface to the Collection", in Pritchard (ed) *The Tokyo Major War Crimes Trial* (1998) xxxi.
[126] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, 82 *UNTS* 279.
[127] As asserted for example by Scharf, "The ICC's Jurisdiction over Nationals of Non-Party States: A Critique of the U.S. Position", (2001) 64 *Law and Contemp. Problems* 67, 103 *et seq* who also relies on *Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), para 73, U.N. Doc. S/25274 (1993).
[128] This view is taken by Schwarzenberger, "The Judgment of Nuremberg" (1947) 21 *Tulane Law Review* 329, reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008), 166; Wright, "The Law of the Nuremberg Trial" (1947) 41 *AJIL* 38, reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008) 320, 331; and by Morris, above n37, 38.

authority of Germany.[129] In short it was a forerunner of the more modern mixed/hybrid tribunals.

The Tribunal itself appeared to take the view that it was based on the national jurisdiction possessed by the Allied Powers acting as sovereign authority for Germany. It stated that:

> [T]he making of the Charter [establishing the Nuremberg tribunal] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.[130]

A review of the literature reveals that the view that ascribes an exclusively international character to the Nuremberg Tribunal as a matter of international law is of relatively recent vintage. The question of the legal basis for and the status of the Nuremberg Tribunal did not receive a great deal of examination around the time of creation and operation of the tribunal. However, the view of tribunal and the majority of those writing contemporaneously was that the legal basis was to be found in the domestic powers of the Allied Powers acting as occupiers and sovereign authority over Germany.[131] An alternative, put forward by the UN Secretary General in his report on the Tribunal in the years following its judgment also contemplates the exercise of domestic jurisdiction by the Allies, but not as occupiers but instead on the basis of the protective or universality principles.[132] Hans Kelsen was one contemporary writer who took the view that "the trial has not been placed on a national or quasinational (condominium), but on an international legal basis."[133] However, he went on to criticise the international legality of the tribunal on the ground that the consent of the defeated power was not obtained for the prosecution.[134]

Even if one were to take the view that the Nuremburg Tribunal was not a national or quasi-national tribunal but instead was a tribunal operating exclusively on the plane of international law, there would still be the question whether it operated in the absence of the consent of the State whose acts it judged when it considered the waging of aggressive war. At the relevant time Germany had surrendered to the Allied powers and had been occupied by those countries. Strictly speaking, Germany had lost its sovereignty, in the sense of its independence, as a matter of international law, and the Allied powers had assumed governmental control over it. In fact, and in law, they had joint supreme authority or

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[129] Schwelb, "Crimes Against Humanity", (1946) 23 *BYIL* 178, reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008) 120, 149-53.
[130] (1947) 41 AJIL 172, 216.
[131] See the works cited at notes 128 & 129 above. See also the statement by Francis Biddle, the US member of the Tribunal that the status of the tribunal was based on the principle that "victorious powers may set up tribunals ... in the territories they have conquered and occupied." Biddle, "The Nürnberg Trial", (1947) 91(3) Proceedings of the American Philosophical Society, reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008), 200-1.
[132] *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*, 80, U.N. Doc. A/CN.4/5, (1949).
[133] Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" (1947) 1 *Int. Law. Quarterly* 153, reprinted in Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008) 274, 286.
[134] *Idem*.

sovereignty over Germany.[135] This means that Allied powers possessed the right and power to exercise for Germany all acts and all competences which the German government could have exercised and possessed. From this perspective, the establishment of the Nuremberg Tribunal cannot be regarded as departing from the principle of consent or indeed of establishing a new principle whereby an international tribunal can be established which pronounces, as an essential aspect of its jurisdiction, on the obligations and responsibilities of a State, without the consent of that State. Clearly, the Allied powers, which were the governing authorities of Germany, consented to the exercise of jurisdiction over German acts by the Nuremburg Tribunal, for they established it.[136]

7. Domestic Courts, Transferred Jurisdiction and Prosecutions for Aggression

The leading theory of the legal basis for the exercise of criminal jurisdiction by the ICC is that the tribunal represents a delegation by States of the criminal jurisdiction they possess with respect to their nationals or events which occur within their territory.[137] When applied to the crime of aggression, this theory would require that courts of the State of the victim of aggression (the territorial State) have competence to prosecute for aggression in order for the ICC to be given jurisdiction over aggression committed by a non-consenting State.[138] Thus it is worth examining, first whether domestic courts can prosecute leaders of other States for aggression and, if they can, second, whether it would be legitimate to transfer such jurisdiction to the ICC.

When drafting the 1996 Code of Crimes Against the Peace and Security of Mankind, the ILC was of the view that domestic courts do not have the competence to prosecute for aggression

[135] For a discussion of these matters, see Mann, "The Present Legal Status of Germany", (1947) *Int. Law Quarterly* 314 *reprinted in* Mann, *Studies in International Law* (1973) 634; Kelsen, "The Legal Status of Germany According to the Declaration of Berlin", (1945) 39 *AJIL* 518; Mann, "Germany's Present Legal Status Revisited", (1967) ICLQ 760 *reprinted in* Mann, *Studies in International Law* (1973) 660.

[136] Morris, above n37, 40.

[137] For discussion of this theory, with contrasting views on its implications for the ICC, see Akande, note 31 above; Scharf, note 127 above, and Morris, note 37 above.

[138] If the jurisdictional rules contained in the Rome Statute of 1998 were retained, there is a possibility that the ICC would have jurisdiction over the individual alleged to have committed aggression because the State of nationality has accepted the jurisdiction of the ICC over aggression. Since the State of nationality would usually be the State which is alleged to have committed the aggression there would be no problem of consent in such a scenario. However, it may be possible that the individual concerned has the nationality of one State but acted as a leader of another State (perhaps even having dual nationality). This scenario would raise the problem of consent highlighted in this article where the State alleged to have committed aggression is not a party to the Statute or has not accepted the aggression amendment. Most of the considerations discussed in the present section would apply to that scenario.

(as distinct from other international crimes which could be made subject to domestic jurisdiction).[139] The ILC stated that:

> The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.[140]

The similarity between this position and the consent rule is obvious, though the ILC was speaking in relation to domestic courts and the consent rule applies to international courts. Indeed, as noted above, Crawford regards the consent rule as applied to international tribunals as supporting, at least by analogy, restraints on the exercise by States of judicial jurisdiction over sovereign acts of other States.[141]

The general principle stated by the ILC which would bar domestic courts from exercising jurisdiction over the crime of aggression is however subject to some limitations. First of all, the principle would not bar domestic courts from exercising jurisdiction over aggression committed by their own State. There would be no breach of the *par in parem non habet imperium* in such a case. Secondly, international law would not forbid the prosecution by a victim of State of an act of aggression committed against it.[142] In engaging in such prosecutions, the State would still be sitting in judgment on the acts of another State. However, as the US Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*, "the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."[143] Where a victim State prosecutes for aggression committed against it, that State is in reality exercising a form of self-help – which is not proscribed (but only limited) by international law.

Although there are some national laws that criminalise crimes against peace or acts of aggression and a few precedents of domestic prosecution for aggression in connection with World War II,[144] none of those precedents depart from the limitations established in the previous paragraph. In all those cases, the prosecution related to aggression committed against the State that initiated the prosecution. Furthermore, there have been no examples of

[139] Art. 8, ILC Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission on the Work of its Forty-Eight Session*, UN Doc. A/51/10 (1996).
[140] *Idem.,* 49-50.
[141] See note 48 above.
[142] Werle, "The Crime of Aggression between International and Domestic Criminal Law" at http://www.defensesociale.org/xvcongreso/ponencias/GerhardWerle.pdf.
[143] 376 US 398, 423 (1964).
[144] Note that there were some national prosecutions for crimes against peace by the tribunals established by Allied powers after World War II. See the cases cited by Strapatsas, "Complementarity and Aggression: A Ticking Time Bomb?" in Stahn & van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010) 450, 454-5. See also the decisions of the Dutch Court pronouncing on aggression when prosecuting German officers for war crimes committed in the Netherlands during World War II: *In re Zuhlke*, (1948) 15 *ILR* 417.

domestic prosecutions for aggression since World War II.[145] It is noteworthy that many of these national laws providing for the possibility of prosecuting the crime of aggression do respect the principles stated above and are restricted to aggression involving the State concerned (i.e., either by or against that State).[146] Those which are expressed more generally would have to be read subject to these principles to be compatible with the *par in parem non habet imperium* notion.

Given that domestic courts of the victim State may at least exercise jurisdiction over the crime of aggression, the question is whether the State of territoriality may confer that jurisdiction on the ICC such that the court may exercise jurisdiction over official acts of the aggressor without its consent. In her article written in 2001,[147] Professor Morris argued that it is impermissible for States to delegate their national criminal jurisdiction to an international court. She argued that this is so because the consequences of the exercise of that criminal jurisdiction are fundamentally different when carried out by an international tribunal as opposed to a national court.[148] She pointed out that, whilst decisions of foreign national courts in prosecutions for international crimes resulting from official acts can be dismissed by the State of nationality as a disagreement between equals, a decision by an international court would carry more weight and have greater political impact.[149] Therefore, "States would have reason to be more concerned about the political impact of adjudications before an international court than before an individual State's courts."[150]

Responding to Morris, I argued in 2003 that "there are important reasons of principle and sufficient precedent to suggest that delegations of national jurisdiction to international courts, in general, and to the ICC, in particular, are lawful."[151] In particular, I pointed out that as a matter of principle, given that the crimes within the jurisdiction of the ICC are also crimes with respect to which international law permits universal jurisdiction, it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual States - acting as agents of the community – simultaneously prevented those individual states from acting collectively in the prosecution of these crimes. The same principle that allows for individual prosecution in the collective interest suggests that those States

[145] Though attempts have been made in Germany, see Kress, "The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression Against Iraq", (2004) 2 *JICJ* 245.

[146] For detailed analysis of national laws dealing with the crime of aggression, see Reisinger, "Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime", in Göran Sluiter/Carsten Stahn (eds.), *The ICC's Emerging Practice: The Court At Five Years* (2009) 725-754; Reisnger, "National Legislation on Individual Responsibility for Conduct Amounting to Aggression", in: Roberto Bellelli (ed.), *International Criminal Justice. Lessons Learned and the Challenges Ahead* (2009 forthcoming). See a summary of a paper presented by Reisinger on this topic at http://www.torinoconference.com/english.pdf at pp55-7.

[147] Morris, above n37.

[148] *Idem.*, 29-47.

[149] *Idem.*

[150] *Idem.*, 30.

[151] Akande, above n31, 625 *et seq.*

should be able to act collectively to achieve the same end. I also pointed to numerous previous examples of the delegation of criminal jurisdiction by States to other States and to international tribunals.

I remain committed to the view I expressed in 2003. However, as I pointed out then, aggression is different.[152] The principles and precedents supporting the delegation of domestic criminal jurisdiction do not quite extend to aggression. In the first place, there is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression. More importantly, when domestic courts prosecute for aggression they are not acting in the collective interest. As pointed out above, domestic courts prosecuting for aggression are exercising a form of self help and are acting to protect domestic interests. It is that domestic interest which makes the victim State the exceptional domestic authority that is competent to prosecute for aggression. Such prosecutions are a response to a wrong done to the forum and are not, at least not at present, a form of delegation of authority by the international community to the national courts. Furthermore given that such prosecutions are a form of self help (which is what overcomes the *par in parem non habet imperium* principle), the political and legal responsibility for whatever political damage or legal wrong might be done to the other State ought, in principle, to be borne by the State exercising the remedy of self help. Transferring the jurisdiction to the ICC would reduce or even remove that responsibility. Secondly, as discussed above, there are no precedents for the transfer of jurisdiction over aggression to an international court. The closest one comes is Nuremberg and Tokyo and, as discussed above, both are better regarded as national tribunals (or at best mixed tribunals). In any event both tribunals prosecuted with the consent of the then existing government with authority over Germany and Japan.

8. The Security Council Solution to the Consent Problem

Given that non-parties as well as States that do not accept the amendments regarding aggression will be non-consenting States for the purpose of the *Monetary Gold* consent principle, as a matter of general international law the ICC, in principle, can only exercise jurisdiction over aggression with respect to those States which accept or ratify the amendment. This group of accepting States is likely to remain small, at least in the years immediately following the adoption of the amendment. This raises the question whether the Security Council can refer a case regarding aggression to the ICC with regard to non-States parties or non-consenting States. Under the Rome Statute, the Security Council may refer cases to the ICC even for crimes that are neither committed by a national of a non-party nor committed on the territory of a State party.[153] It was assumed in the drafting of the aggression amendments that the Security Council can refer cases relating to aggression even for non-

[152] *Idem.*, 637.
[153] Art. 13(b), ICC Statute.

consenting States.[154] While this may be correct as a matter of interpretation of the Statute, the question is whether as a matter of general international law such a referral would free the ICC from the operation of the *Monetary Gold* consent principle.

At this point, it is worth examining a possible exception to the *Monetary Gold* consent principle with a view to determining whether it might provide a means of expanding ICC jurisdiction over aggression beyond directly consenting States. One exception which might be of relevance to the ICC is that it has been held that "if the legal finding against an absent third party could be taken as a given (for example, by reason of an authoritative decision of the Security Council on the point), the [*Monetary Gold*] principle may well not apply."[155] The basis of this assumption is that if the international tribunal is simply applying a legal finding which is already binding or authoritative with respect to the third State there can be no complaint with of an overreach of competence as the tribunal is not really exercising its own competence but simply accepting a reality already determined by a competent body. Indeed a similar exception ought to operate where a domestic court was making determinations regarding foreign aggression. Domestic courts ought not to be bound to close their eyes to authoritative determinations already made[156] or indeed to positions that have actually been accepted by the State concerned.

This exception to the *Monetary Gold* principle was relied on by Portugal in the *East Timor case* when it argued that the General Assembly and the Security Council had already determined the status of East Timor as a non-self governing territory and that Portugal was the legitimate administering power of that territory. For Portugal, this meant the Court was not required to pronounce on the lawfulness of Indonesia's use of force in East Timor and of its presence there.[157] Although the ICJ rejected the conclusion that Portugal drew from its argument, the ICJ did not reject the basis of the argument. The Court held that the points Portugal sought to infer from the UN resolutions did not in fact follow from the fact that those resolutions recognised Portugal as the administering authority of East Timor. It then held that "without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the Parties."[158]

This exception is directly relevant to proposals to allow the ICC to exercise jurisdiction with respect to aggression only where the Security Council or the General Assembly or indeed the ICJ has made a determination that aggression has been committed. The value of such a prior determination might be that the ICC would be able to circumvent the *Monetary Gold* consent principle by taking the prior finding as a given. For such an approach to work, consistently with

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[154] See ICC-ASP/8/INF.2, Annex III, para. 8 "The question of consent by the alleged aggressor State needs to be addressed only with respect to State referrals and *proprio motu* investigations. No such consent would be required in case of a Security Council referral based on the Council's authority under Chapter VII of the United Nations Charter."

[155] *Larsen v. Hawaiian Kingdom*, 119 ILR 566, 592, para. 11.24 (2001).

[156] See *Kuwait Airways Corp v. Iraq Airways Co. (No. 2)*, [2002] 2 WLR 135 [UK House of Lords].

[157] *East Timor Case*, (1995) ICJ Rep 90, 103, para. 30.

[158] *Idem*., 104, para. 33.

the exception, it would have to be shown that the prior determination was authoritative and perhaps even binding on the alleged aggressor State. Clearly the Security Council and the International Court of Justice have authority to make findings regarding aggression which would have binding effect on an aggressor State. While the General Assembly has competence to act with respect to international peace and security under Articles 10-14 of the UN Charter, it does not have the authority to make binding decisions on these matters. It is therefore doubtful that the exception would provide a sufficient basis on which to use a General Assembly resolution to circumvent the consent problem. Were the Assembly to make a determination of aggression (as it has done in the past) the alleged aggressor State would still have grounds to complain if the ICC used this (without the consent of that State) as a basis for a finding that the State had committed aggression. Indeed the same complaint would be valid in the context of an advisory opinion of the ICJ.

However, requiring prior determination of aggression by a competent body for ICC prosecution would overcome the consent problem but would cause its own problems. In the first place, a decision would need to be made as to whether the ICC will be bound by the determination of aggression by the Security Council (or the ICJ). If the determination were not regarded as binding on the ICC and the ICC could still seek to examine for itself whether aggression had actually been committed, then there would still be a violation of the consent principle. The ICC would still be adjudicating on the rights and obligations of a third State – though in this case with a view to reaching a decision favourable to that third State (the alleged aggressor State). That is, with a view to seeing whether it might be the case that aggression has *not* been committed. Also, such a system would be designed to explicitly achieve review of the decisions of the Security Council and/or the ICJ on these matters. While review of Council decisions is not in itself to be avoided nor is it a necessarily a bad thing,[159] one wonders whether it is wise to set up a system which invites tension between these bodies. If, on the other hand, the prior determination that aggression has been committed is binding on the ICC, then it would mean that a key decision, indeed an element of the crime of aggression, is determined not by the Court in the context of a prosecution but by another body. This would seriously challenge the principle of according fair trials. The individual charged before the ICC would not have had an opportunity to make representations or affect the determination of a key issue in the prosecution case. Furthermore, that decision may well have been made by a political body which was not applying legal standards (as a matter of substance).

Thus whether the prior decision is to be regarded as binding on the ICC or not, serious problems would be caused. Therefore although the exception regarding prior authoritative decisions as 'givens' is legally available, it would be inadvisable as a matter of policy.

One other possible solution to the *Monetary Gold* consent problem lies with Security Council referrals to the Court. The proposal here is not that ICC prosecutions should be dependent on prior determinations of aggression by the Council, but rather that in cases where the alleged aggressor State has not consented to the jurisdiction of the Court with regard to aggression,

[159] See Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations", (1997) 46 *ICLQ* 309.

prosecutions can only proceed on the basis of an explicit referral of the situation to the Court. In such cases, the consent problem would be overcome in much the same way that the consent problem is overcome with regard to advisory opinions of the ICJ. In these cases, the consent to the adjudication is to be found in the Charter and in the obligations that UN members have accepted in the Charter. Where the Security Council refers a matter to the ICC, the Council is conferring a competence on the ICC to act, and more specifically a competence to act in accordance with its Statute.[160] The basis on which the Council possesses that power is the UN Charter which imposes obligations on UN Members with respect to the decisions of the Council.

Reliance on the referral power of the Security Council with regard to prosecutions for aggression involving non-consenting States is significant in two ways. First of all, it does not circumvent the consent principle but rather applies it. There is no direct consent given but nonetheless the competence of the ICC is traceable to the consent of the State that has allegedly committed the aggression through its acceptance of the UN Charter. Secondly, when viewed against the background of the consent problem, the role of the Security Council in making referrals to the ICC with regard to aggression is *not one which limits* the competence of the Court. Rather the Security Council comes to the aid of the Court and *expands* its jurisdiction to situations where the ICC would otherwise be legally incompetent to act. On this view, giving the Security Council almost exclusive competence with regard to aggression is not to be regarded as a problem to be overcome, but rather as a means of overcoming an existing problem. The view that restricting the competence of the ICC to matters referred by the Security Council is an unacceptable narrowing of the Court's jurisdiction assumes that it is possible as a matter of law for the Court to have a broad jurisdiction and ignores the consent problem. The option suggested here would be consistent with Rome Statute's provisions relating to referral and with the power of the Security Council to impose dispute settlement procedures on States when it acts under Chapter VII of the Charter.[161]

9. Disapplying the Consent Principle in the Context of ICC Prosecutions of Aggression: Violation or Evolution of the Law

On the basis of the law *as it currently stands* the most acceptable solution with regard to the jurisdiction of the ICC with respect to aggression is to limit that jurisdiction to acts of aggression committed by States which accept the jurisdiction of the ICC for that crime and to situations where the Security Council has referred a situation to the Court. This may be regarded by some as a satisfactory solution on the basis of policy considerations but it is also a solution that is driven by international law as it stands. Any more expansive conferral of

[160] Akande, above n30, 333-52.
[161] For example, the UN Security Council in Res 687 (1991) created the UN Compensation Commission to adjudicate on claims against Iraq arising out of its invasion of Iraq. For the operation of the UNCC and some of its case law, see Vol. 109 of the Int. Law Reports.

jurisdiction is one that non-consenting States would be within their rights to resist and protest against.

However, the question that arises is whether international law ought to move beyond the law as it stands. Should international law remain wedded to consent as the basis for international tribunals, or should we start to accept that States may be subject to the authority of international tribunals without their consent? In other words, should international law move away from a consensual paradigm of adjudication to a compulsory paradigm?[162] Although the jurisdiction of all international tribunals that exercise some authority over States is currently based on consent, there has been a perceptible shift in the degree of consent that is required. We have moved from the situation which operated with regard to the first form of international adjudication, i.e. arbitration, where States were required to give specific consent to the adjudication of an international dispute by the tribunal. Although that form of consent is still possible, international law now recognises that a more general form of consent can be given which is not tied to a particular dispute. Therefore consent can be given in advance to the jurisdiction of an international tribunal or dispute settlement mechanism with respect to all disputes arising under a particular treaty, thus obviating a need for case by case consent. The dispute settlement systems of the World Trade Organization[163] and that of the United Nations Law of the Sea Convention[164] were created with this feature. Around the same time that those treaties came into force (the mid 1990s), Protocol 11 of the European Convention on Human Rights transformed the jurisdiction of the Court from one based on optional acceptances of a general compulsory jurisdiction of the European Court of Human Rights (much like what existed with the ICJ) to a mandatory acceptance of compulsory jurisdiction for States parties.[165] Thus within both areas of international law, a form of compulsory jurisdiction is achieved though in point of law that compulsory jurisdiction is traceable back to the consent given by the State becoming a party to the relevant treaty. Even broader is the so-called optional clause of the International Court of Justice under which States *may* accept as compulsory the jurisdiction of that Court with respect to all legal disputes with any other State accepting the same obligation.[166] But even here the consent principle is respected as the jurisdiction only exists where accepted by States and only exists within the limits of that acceptance.

As discussed in Section 4 above, the ICJ has developed a sort of compulsory jurisdiction with respect to advisory opinions and pronounces on situations which may exist as disputes between States using that procedure. Not only that, it goes so far as to pronounce on the obligations and legal responsibilities of named States in those opinions, even when those

[162] See Romano, '"The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent ', (2007) 39 *NYU J Int'l L and Politics* 791.
[163] See the "Understanding on the Rules and Procedures Governing the Settlement of Disputes", Annex II to the Agreement Establishing the World Trade Organization 1994.
[164] See Part XV, United Nations Convention on the Law of the Sea 1982.
[165] Convention for the Protection of Human Rights and Fundamental Freedom, Protocol 11, 5 Nov. 1994, *ETS* No. 5.
[166] Art. 36(2), Statute of the ICJ.

States object to the Court rendering the opinion. However, all of this is still ultimately traced back to the competence given to the Court by the UN Charter and the Court's Statute, a competence accepted by members of the UN. So consent, though rather attenuated, is still a guiding feature. There has not yet been a decisive break with that principle.[167]

If the ICC is given a competence to make legal determinations regarding the aggressive acts of non-consenting States this would be the first instance in which an international tribunal is given specific competence to make legal rulings on the acts of non-consenting States. The decisive break with consent would be made. To be sure, this would only occur in circumstances where the Court is exercising an indirect and non-binding jurisdiction over the relevant State. Therefore it would not be a frontal assault on the consent principle – as no attempt is made to bind the non-consenting State. Nonetheless, it would be an assault on the *Monetary Gold* manifestation of the principle. A chunk would be cut off the principle, but a rather significant chunk, perhaps even the straw that breaks the back of the camel of consent. When one recalls that consent is derived from the principle of independence, the governing framework with regard to Statehood, this would be significant in the evolution of the constitution of the international society. The decisive move here would be the acceptance that some States can create an institution which would subject other States to the authority of that institution without their consent. An indirect authority – but in this context a very real authority, given that it is intended to affect the governance of the other States. To the extent the ICC deals with leaders in office, this would be regime change by judicial action.

Granting permission for an international court to adjudicate on the obligations of non-consenting States would be a departure from the voluntarist principles that have characterised much of international law to date. Many have observed a move away from this voluntarism. Indeed Prosper Weil made a powerful critique of this trend nearly three decades ago.[168] In my view, what is significant here is that this trend away from voluntarism is one which has been advocated by scholars and courts. There has not been a warm embrace by States who at the very least pay lip service to, and at most worship at the altar of independence, equality and consent. An amended ICC Statute allowing adjudication of aggression by non-consenting States might well be the first explicit embrace by States (some States) of non-voluntarist principles in a treaty.

Where would such a development take us? Would it simply be a further evolution of the law? Perhaps, it would be an evolution which is the natural progression of the developments indicated above. Alternatively, it is a violation of existing law and a departure from our governing theoretical framework for international law. Or it is both a violation and an

[167] The two *Peace Treaties Advisory Opinions*, (1950) ICJ Rep 65 & 221, discussed in Section 4 above, are the closest we have come to decisions which it is difficult to reconcile with the consent principle given that the relevant States were non-members of the UN. However, even in those cases there was a link with the UN as the UN was given specific competence to act under the relevant Peace Treaties and it may be argued that the relevant States must have accepted that the UN would act within the context of the Charter.

[168] Weil, "Towards Relative Normativity in International Law?" (1983) 77 *AJIL* 413. For a response to Weil, see Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case", (1996) 16 *Oxford Journal of Legal Studies*, 85-128.

evolution? This would not be new in international law. Indeed there is a good case to be made that this is an intrinsic feature of international law. It is necessary to break it to change it. Whether it changes or not would depend on how well accepted those new developments take hold. International criminal law has been shaped in this way. There is little doubt that there was a violation of the principle of legality (non-retroactivity) in the Nuremberg and Tokyo processes. Indeed some of the judicial developments by the ICTY have also taken this form.

10. Conclusion

This paper has argued for recognition of the principle of consent in existing international law. It has suggested a means by which ICC jurisdiction can be made consistent with that principle. The paper has also pointed out the significant theoretical development that would be taking place were the consent principle not to be respected. What is left for discussion is whether the international community wishes to go where it has never gone before, and where it now appears to be headed, in conferring jurisdiction to the ICC over aggression. To have that discussion, it is important to recognise where we are at present and where the proposals regarding the ICC are taking us. Whether we are willing to take this decisive step away from the consent principle and its underlying principle of the independence of States remains to be decided.