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FROM TAKASHI SAKAI TO KAMPALA. CHINA AND THE CRIMINALIZATION OF AGGRESSION THROUGH THE LOOKING GLASS OF THE DICHOTOMY JUSTICE AND MAINTENANCE OF PEACE AND SECURITY

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To my grandma,
Nonna Germana,
with immense love and gratitude

From Takashi Sakai to Kampala. China and the Criminalization of Aggression Through the Looking Glass of the Dichotomy Justice and Maintenance of Peace and Security

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INTRODUCTION

The first half of the twentieth century saw the widespread unleash of dreadful attacks, deaths, and brutalities. Continents were dehumanised by the most destructive global conflicts. The entity of those atrocities however, triggered a series of new responses that grew out of a shared commitment to wipe out any potential prospect of war and restore peace. The international community entered a new chapter. New and more robust systems of security were sought to address the increasing demand for an effective regulation of states power and to guarantee peace and security. Systematic structural changes meddled into the international world order of that time which has since echoed in a wide array of international developments aimed at global safety, peace and stability. The results of those efforts are inherent features of today's architecture of global governance.

These years were catalysts to the development of international criminal law. Two major landmarks crystallised with the end of the two world wars, namely the outlawry of war and the attribution of individual liability for international crimes. The adoption of judicial measures seemed to be the most suitable mechanisms to respond to the needs of that time. Justice became central to the notion of peace and the new order developed by means of two distinct but interconnected institutional designs: the United Nations and the International Military Tribunals in Nuremberg and Tokyo.

These events were the results of a revolution on the outlawry of war that started with the Paris Peace Pact. They marked the early stages of the development of the new system of collective security and international criminal law. The new framework was part of a wider project aimed at attaining peace. Particular attention was originally given to the criminalisation of aggression, prosecuted under the charges of *crimes against peace.*

From the post-war years to the inauguration of the International Criminal Court in 1998 and the adoption of the Kampala amendments on the crime of aggression in 2010, the evolution of international criminal law materialised the tension between justice and maintenance of peace and security, cardinal dichotomy of this work. The role and the mandate of the International Criminal Court and that of the Security Council are, for the scope of this research, the institutional mirror of those two juridical values.

The crime of aggression is the cradle of these dichotomies, both at the substantive and at the institutional level. The complexity that the crime conceals is primarily linked to the unique character of the crime that entails dual responsibility together with the capacity to protect and encroach on state sovereignty. These aspects explain, at least in part, the protracted negotiations that were necessary to reach a compromise over the definition and application of the crime.

With the closing of the Diplomatic Conference in Rome for the establishment of the International Criminal Court (1998), the adoption of the Rome Statute provided for the new Court's jurisdiction over the crime of aggression but postponed its definition and enforcement until 2010. The Kampala Review Conference on the Rome Statute took place in Kampala from 31 May to 11 June 2010 and concluded with the adoption of the definition of the crime of aggression. In December 2017 the Assembly of States Parties adopted a resolution aimed at the activation of the Court's jurisdiction over the crime of aggression that eventually occurred only on 17 July 2018.

In this lengthy process that took nearly a whole century, China featured as one of the key actors that actively participated in all the negotiations.

Initially under the ruling of the Nationalist government and later under the People's Republic of China, the country engaged in the development of international criminal justice and in the evolution of the crime of aggression since the post-war world.

The unique character that a country like China may hold in connection with an international judicial body like the ICC and the codification and prosecution of the crime of aggression, is given by the interplay of its role as permanent member, as leading developing country, as global power, and as a country that holds a millenarian culture and a living tradition. For thousands of years China set at the centre of the so-called sinocentric system around which the far eastern region developed. It was sound enough to endure the general sequence of historical ages and empires, until western powers took it to pieces in the nineteenth century. China had to set on, and grow upon, non-traditional pillars to adapt to the new world order governed by non-Chinese standards. However, the country also tried to re-establish its own approach while setting in line with that of the global community. In doing so, it was keen to preserve certain elements that are part of the country culture and tradition. This set of efforts has granted the country a unique character on the international sphere, echoed in the state attitude before the ICC, and the crime of aggression.

Contribution and research gap

The understanding of China's position towards the ICC and the crime of aggression gives a perspective on the state engagement with the global community. As leading developing country and global power, China's weight on the international legal, political or economic discourse has direct influence on the effective functioning of the system of global governance. This research will therefore try to clarify to the international public the relationship between China, the ICC and the crime of aggression. It tries to recognize the country approach to international criminal institutions and multilateralism and to unveil possible policy interests behind the country choices.

The complexity of a country like China merges in this research with the complexity of the crime of aggression. The controversial nature of the crime brings up many gaps to be explored. This research seeks to explore and fulfil one of the many gaps the controversial nature of the crime generates and to contribute to the existing literature on the subject. It also wants to be a thought-provoking source of inspiration for international scholars, policy-makers, practitioner, sinologists and those interested in the subject. The multidisciplinary approach of the work makes the research accessible to a wider public thanks to the broader scope of the fields of interest and the extensive vocabulary it entails, while remaining accurate and in compliance with academic research standards.

An important aspect to consider so to better appreciate the originality of this work and the contribution it wishes to bring, is the non-Chinese identity of the author. Most of the existing literature on the subject is authored by Chinese scholars, and despite the cultural bias may occur when a subject of study is approached by a person foreign to the culture at stake, the opposite may also be true. The author has approached such a multi-layered multidisciplinary work with the lenses of a sinologist, that knows the country both theoretically and in practice. This may also justify the central role that this research attributes to the cultural dimension. It is the linchpin around which the country behaviour can be interpreted. To preclude that may result in a limited understanding of the country behaviour, often understood as expression of a non-liberal design that can function only in association to state power.

Research aim

The research aims at examining (1) the role that China has played during the substantive development of the crime of aggression framed on the dichotomy justice and maintenance of peace and security. It therefore tries to understand whether such role conceals any sizeable inclination towards the maintenance of peace and security rather than justice, or vice-versa. Upon the findings that the first research objective may bring, the research will then attempt to (2) draw on the *why* and *how* of the country attitude. Culture will be introduced in the analysis as extra-legal factor to elucidate on the degree to which the country behaviour mirrors its cultural identity. Culture is the quintessential prerequisite to a comprehensive analysis of the matter at stake, critical to reduce the analytical bias and ensure a valid completion of the research work.

Methodology and structure

The research relies mostly on reports, treaties, judgments, *travaux préparatoires,* commentaries and relevant resources available via the libraries and online. The research also employs qualitative semi-structured interviews taken with major figures involved in the negotiations in Rome and Kampala. The names and details of interviewees will be kept anonymous, and the transcripts remain with the author. Excerpts from the interview's transcripts inserted in the text will be quoted under the name *Interviewee* followed by a consecutive number according to the order the interviews were taken.

Interviews were held both in person and online during the visiting time with iCourts, Center of Excellence for International Courts of the University of Copenhagen. Due to the global pandemic that has affected the world since the beginning of the second year of the doctoral project, the research lacks archival materials and enjoys only a limited amount of Chinese language sources due to the impossibility of international mobility. These aspects are part of the research limitations.

The work is framed in four chapter.

The first chapter draws on the main historical events and processes part of the development of international criminal law (ICL) keeping the dichotomy maintenance of international peace and security, and justice as the main structural choice on which the chapter is articulated. In order to do so, the chapter will chronologically frame the main stages of its evolution. It will identify three historical moments around which the whole chapter is built: 1945, 1990s, and 1998-2000s. It will therefore start by giving an account of the early post-

war world dynamics, the adoption of the UN Charter, and the creation of the military tribunals in Nuremberg and Tokyo. It will continue with an outline on the gradual development of ICL and the establishment of the International Criminal Court (ICC). The interplay between the functions and the powers of the United Nations Security Council (UNSC) and those of the various international tribunals will be integral to the chronological analysis, reflecting the essence of the tensions between law and politics. This section will serve as an interpretation of the history of the dichotomy between peace and justice mirrored in the evolution of the powers, practices and functions of the institutional dimensions of ICL, meaning the International Criminal Tribunals (ICTs) and the UNSC. This chapter will set some basic background conditions to provide the reader with one out of many possible lenses through which this work should be approached.

The Second Chapter will draw on a historical and substantive analysis of the criminalization of aggression. Choosing the interwar years as the earliest stage of the development of the crime, the chapter will outline how crimes against peace first, and aggression later, eventually made their way onto the lexicon of international law. This chapter therefore will run through the interwar years, the tribunals in Nuremberg and Tokyo, the unfolding of the works of the General Assembly, the International Law Commission and various Special Committees, leading up to the negotiations in Rome and later in Kampala. A substantive analysis of the codification of the crime, will look at the interplay between the International Law Commission (ILC), the General Assembly (UNGA), the International Court of Justice (ICJ) and the Security Council. Despite the overlapping time of their work on aggression, the ILC's work on the draft codes and draft statute will be analysed distinctly from that of the General Assembly. This choice embraces the interplay between aggression *qua* serious breach of international obligations for which states may be held responsible, and aggression *qua* international crime raising to individual criminal responsibility.

The third Chapter will focus on China and will be divided into two different parts. The first part of the Chapter will give some insights of the Chinese culture and history essential to carry out the country-specific analysis. It is basically an introductory section that aims at giving a brief account of the Chinese legal culture comprised of the philosophical, historical and socio-political aspects of a millenarian civilization. The aim of this part is to give shape to the lenses through which a state behaviour, comprised of its own culture, tradition, and

needs, should be looked at in the development of international norms. This historical journey explains why the concept of sovereignty is at the heart of the Chinese international legal discourse and foreign policy and tries to qualify on what grounds peace, security and justice are part of it.
As explanatory record, this part will be functional to understand more comprehensively the country role and attitude towards ICL, the crime of aggression, and the dichotomy upon which this research is conceived.

The second part of the Chapter wants to draw on the main instances of the Chinese engagement at the various processes of the development of international criminal law and in the concurrent evolution of the crime of aggression. In order to do so, the main stages of its evolution will be chronologically framed in an attempt to be consistent with the same structure of the previous chapters. It will therefore start by giving an account of the country presence in the post WWI and post WWII efforts. It will then touch upon the events of the tribunal in Tokyo, the subsequent endeavours towards the establishment of the International Criminal Court and the negotiation process that concluded with the Kampala Review Conference and the adoption of the amendments on the crime of aggression.

The fourth and final chapter is the conclusive chapter framed to draw the threads of the whole analysis. It will try to identify the country inclination in the dichotomy justice and maintenance of international peace and security and to interpret it with a multi-dimensional approach that connects the country priorities in domestic and foreign policy, to culture, to the country attitude in relation to the development of International Criminal Law and more specifically of the Crime of Aggression. This final chapter is thought to be the answer to the second research objective.

CHAPTER I

The evolving system of international criminal law. A global project for peace, security and justice

1. Introduction

2. Responses to world war atrocities: pursuing peace in a new world order
   2.1. The Conference on International Organisations in San Francisco and the establishment of the United Nations
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   4.1. Tensions between law and politics and *la raison d'être* of the ICC and the Security Council
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5. Conclusion

1. **Introduction**

Responses to atrocities are always unique and context dependent. They cannot be foretold nor easily prompted. However, the events of the twentieth century had set the scene for the international community to explore new and more robust systems in response to war atrocities with the ultimate goal being the restoration and maintenance of peace and security. Systematic structural changes meddled into the international world order of that time, which

has since echoed in a wide array of developments that international law and the international system of collective security has experienced up to today.

The outlawry of war and the attribution of individual liability for international crimes were two major landmarks that crystallised with the end of the two world wars, setting the roots for the development of international criminal law. The adoption of judicial measures to achieve peace set justice as key value at the heart of the new international system, integral to peace processes.

From the London Conference for the establishment of the first international military tribunal to Rome at the inauguration of a permanent international criminal court, the development of international criminal law has shaped in itself the degree of tensions between justice and maintenance of peace and security, cardinal dichotomy of this work. For the scope of this research, the institutional mandates and roles of the Security Council and the International Criminal Tribunals will reflect respectively those two juridical values.

On these premises, this first chapter tries to draw on the main historical events and processes in the development of international criminal law (ICL) through the looking glass of the the dichotomy maintenance of peace and security, and justice. In order to do so, the chapter will chronologically frame the main stages of its evolution. It will start by giving an account of the early efforts of the post-war world that saw the adoption of the United Nations Charter, and the creation of the military tribunals in Nuremberg and Tokyo. It will then touch upon the events of the two *ad hoc* tribunals created in the 1990s, to follow on the gradual codification of ICL and the establishment of the International Criminal Court (ICC). The relationship between the functions and the powers of the United Nations Security Council and those of the various international tribunals will be integral to such chronological trajectory, reflecting the essence of the tensions between law and politics.

This chapter will set some basic background conditions to provide the reader with one out of many possible lenses through which this work should be approached.

2. Responses to world war atrocities: pursuing peace in a new world order

Before the first half of the twentieth century and the breakout of the two most devastating wars in world history, warfare was historically understood as main and only tool for states to expand their sovereign powers and foster national interest.

Nevertheless, the atrocities and the global struggle that the two world wars brought led to an increasing demand for a systematic regulation of state power and practice in the hope that peace and security are guaranteed.

But how would the international community guarantee the restoration, enforcement and maintenance of peace and security?

The opprobrium that the war could carry in itself were already clear with the end of the first atrocious war, the Great War. Millions of civilians and soldiers were killed and suffering was enormous. Discontent increased, and public pressure to punish those behind the atrocities began. With Wilson's promise to make that war "the war to end all wars",[1] the idea to make war illegal took ground and was supported by the international public opinion.[2]

In January 1919, together with representatives from nearly forty countries, Great Britain, France, Italy and the US, the four major rulers of the old-world order[3] gathered in Paris and led the proceedings of the Paris Peace Conference. At this venue, the negotiation of the treaty of Versailles and the planning of the League of Nations took place[4]. The League was meant to be an association of nations to secure political independence and territorial integrity of all the states, *great and small alike,* through cooperation.[5]

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1 Wilson borrowed the sentence from the novel by Wells, H. G. (1914). The war that will end war. London. Republished by ReadBooks (2016). See Hathaway, O. A., & Shapiro, S. J. (2017). The internationalists: How a radical plan to outlaw war remade the world. Simon and Schuster. p. 104.

2 Hathaway, O. A., & Shapiro, S. J. (2017), *supra note 1,* p. 104.

3 *Old world order* in the present research refers to the international community before the end of the two world wars. Based on interstate relations, States were the primary actors and war the key instrument to expand their sovereign rights and foster national interests. Such old-world order transformed, when the atrocities of the wars changed public will leading to an increasingly need of control and systematic regulation of the exercise of states power.

4 Paris Peace Conference (1919) available at National WWI Museum and Memorial' (National WWI Museum and Memorial, 2021) https://www.theworldwar.org/learn/peace/paris-peace-conference accessed 18 January 2021.

5 See *Point* 14 in President Woodrow Wilson's Fourteen Points *(8 January 1918)*. The war of the nations: portfolio in rotogravure etchings: compiled from the mid-week pictorial. New York. New York Times Co. (1919), available at https://lccn.loc.gov/19013740, image 501. Available at https://www.loc.gov/resource/collgdc.gc000037/?sp=501&r=-0.5,-0.08,1.999,1.601,0 accessed on 30 January 2022.

On February 1920, the Covenant of the League of Nations was adopted. Its primary objective was to *achieve international peace and security* and the states members to the Covenant had to accept the duty to refrain from resorting to war.[6]

Parallel to the undertakings in Paris, the search for peace set off a whole other series of efforts towards a rather normative eradication of war. In 1927 the French Foreign Minister Aristide Briand sent a proposal to the US for a bilateral agreement to outlaw war. In response, Frank B. Kellogg, US Secretary of State and recipient of the proposed commitment, suggested drafting a multilateral treaty open to all states to *renounce war as an instrument of national policy*[7]. The draft treaty received widespread international support and it was signed by representatives of fifteen nations, amongst which the big four[8], Germany and Japan. The treaty, known as the Pact of Paris, enshrined provisions to renounce war, prevent aggression and promote peaceful dispute settlements[9]. The treaty entered into force on 25 July 1929. Making war illegal was one of the key milestones in the shift from old to new world order.

Nevertheless, the provisions of the League of Nations and the Pact of Paris were not enough to prevent the second atrocious world war from happening. Wilson's promise could not be kept. Cleavages in the limitations imposed by the League[10] and in the attempts of the Kellogg-Briand Pact in making the war illegal, enabled the second world conflict to break out.

Despite such failures, those endeavours brought key changes. New international norms were framed in a way that international protection under the laws of war could easily be dismantled. This opened the floor for future prosecutions of Axis leaders at the end of the second world war.

With the second world war taking ground, new responses to war atrocities were explored and early projects for a system of collective security to achieve peace and security were

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6 See The Covenant of the League of Nations (Including Amendments adopted to December) (1924)

7 Renunciation of War as an Instrument of National Policy (Kellogg-Briand Peace Pact or Pact of Paris) (1928), Treaties and other international agreements of the United States of America, 1776-1949 (Bevans), Vol. 2 Multilateral (1918 -1930).

8 Great Britain, France, Italy and the US.

9 Hathaway, O. A., & Shapiro, S. J. (2017), *supra note 1,* pp. 120 – 130. See also, Lesaffer, R. (2012). Kellogg-Briand Pact (1928). pp. 579-584. The Mukden incident, and the Japanese invasion of Manchuria were the first occasions to prove the functionality of the pact.

10 According to Article 12 of the Covenant of the League of Nations, if a state loses the dispute and does not want to comply with the judgement it could resort to war after three months from the judicial decision. See Article 12, Covenant of the League of Nations (1924)

being born. Within such system, two distinct but interconnected major institutional designs advanced.

One saw the opening of the United Nations Conference on International Organisations in San Francisco (1945) and the establishment of the United Nations (UN). The other, saw the International Conference on Military Trials in London (1945) and the drafting of the Charter of the International Military Tribunal.

As the United Nations on the one hand developed a system aimed at preserving peace and security in the relations between States, the outcome of the London Conference in 1946 and the establishment of the first international criminal tribunals in Nuremberg and Tokyo were to criminalise individual conduct. The degree of outrage of the war called for new legal approaches to halt perpetrators.

The lessons learned by the strengths and weaknesses of the previous endeavours and the geopolitical necessity of that time offered fertile ground to mature ideas on how to best frame such peace ventures.

2.1. The Conference on International Organisations in San Francisco and the establishment of the United Nations

Representatives of Great Britain, the United States, the Union of Soviet Socialist Republics (USSR) and China met for a business-like conference at Dumbarton Oaks in Washington D.C. between August and October 1944 and laid down the foundations for the conception of the United Nations Organisation.[11] Precursor of the conference in San Francisco, the Dumbarton Oaks Conference marked the first important step to shape a post-war international organisation in succession to the League of Nations.[12] The proposal that

[11] History Of The United Nations, un.org, available at https://www.un.org/en/sections/history/history-united-nations/index.html accessed 18 January 2021.

[12] Before the Dumbarton Oaks, small steps were already made. Already in the early years of the 1940s, the Allies had expressed their visions through statements and agreements. Pivotal in those years, was the Atlantic Charter. The Charter was a policy statement for a peaceful post-war world discussed between the US President F. D. Roosevelt and the British Prime Minister W. Churchill in an attempt to cooperate for the sake of international security. On 1 January 1942, Roosevelt, Churchill, Litvinov (USSR) and Soong (China), signed the Declarations by the United Nations, that found support by other twenty-two signatory countries, in the fight against the Axis powers. These early steps committed the Allies to multilateralism both for the short-term fight against fascism and over the longer-term goal to maintain international peace and security and to foster post-war prosperity and social stability. These were the early steps to the establishment of the United Nations. See 1941-1945:Charting the Course for a United World, in *Why it matters:*75 Milestones in International Cooperation, (2020) Annual Series, VOL. I. See also the 1941: The Atlantic Charter' (United Nations).

resulted from the conference was refined in Yalta and modelled into the Charter of the United Nations in San Francisco.

The United Nations Conference on International Organization, from 25 April to 26 June 1945, brought 51 states to gather in San Francisco.[13] The Conference was a successful experiment that bolstered the political will of populations and restored, or consolidated, relations among nations' leaders. The drafting of the new Charter was aimed at making the new organization handling effectively with questions of peace and security.[14] The establishment of the United Nations intended "to save succeeding generations from the scourge of war", "to establish conditions under which justice […] can be maintained" and "to unite [nations'] strength to maintain international peace and security".[15] Peace and security were to be necessarily the essence of the new international world order.[16]

The Charter came into force on 24 October 1945.[17]

The primary purposes of the United Nations were "to maintain international peace and security and to that end to take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of peace (...)".[18] States were called to cooperate, to make alliances, while mechanisms to regulate their power were in place.

Differently from its failed precursor, the major guarantees for the functioning and soundness of the United Nations were primarily linked to its wide degree of representation at the international level[19] and the clearness of the mandate granted to its organs. Commitment to multilateralism was recognised as a necessary rule. The Security Council, main body responsible for matters of peace and security, was granted wide degree of authority.

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13 Forty-five nations that had declared war on Germany and Japan and signed the Declaration by United Nations joined at the San Francisco Conference. Besides them, six more nations were invited, making up for delegates from 50 nations. The San Francisco Conference (1945) in History of the United Nations, Model United Nations, available at https://www.un.org/es/node/44721 accessed on 18 January 2021,

14 1944-1945: Dumbarton Oaks and Yalta (26 August 2015), in History of the United Nations. available at https://www.un.org/en/sections/history-united-nations-charter/1944-1945-dumbarton-oaks-and-yalta/index.html Accessed on 18 January 2021.

15 Preamble, Charter of the United Nations (26 June 1945) United Nations.

16 Weiss, T. G. (2015). The United Nations: before, during and after 1945. International Affairs, 91(6). pp. 1222 – 1223.

17 Charter Of The United Nations, United Nations

18 Article 1, Chapter 1, Charter of the United Nations

19 On 26 June 1945, 50 countries signed the Charter of the United Nations, included the five then-permanent members of the Security Council. In 1946 the first meetings of the UN General Assembly and the Security Council took place in London, attended by representatives of 51 nations. Founding Members, UN Membership, in UN Documentation Research Guide, available at https://research.un.org/en/unmembers/founders accessed 18 January 2021,

The Conference in San Francisco closed shortly before the signing of the London Conference.

2.2. *The London way: from the Conference to the Charter. Establishing the International Military Tribunal.*

While victors' nations were working in San Francisco, efforts to prepare the trials of war criminals started to take place in Europe.

The 1928 Peace Pact was an instrument to outlaw war, not to make aggressive war a crime. Nevertheless, the fact that it removed the legal protection that aggressors had so far enjoyed being war a legitimate means to settle disputes, was very important in the efforts towards the criminalisation of war crimes and acts of aggression.[20] Building on these premises, efforts for legal pragmatism in criminal trials to prosecute war criminals were taking place since the early 1940s.[21] For this purpose, academic scholars and international legal figures such as Hersch Lauterpacht and Rene Cassin were consulted and involved in the works of expert committees and new political commissions.[22] A big machinery behind the scenes of the atrocities of the war was setting into motion. Official and semi-official discussions and negotiations amongst representatives of interested governments and allied powers were taking place. Amongst those various activities, the *London International Assembly*, the *International Commission for Penal Reconstruction and Development* and the *United Nations War Crimes Commission* (UNWCC) deserve special mentions. The works of each of these three bodies focused on the modalities, structures and jurisdictions of criminal prosecutions for war crimes and, to different degrees, strongly influenced the shaping of the two international military tribunals in Nuremberg and in Tokyo[23].

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[20] Lauterpacht claimed that the pact could serve to prosecute axis leaders responsible for waging war. The planned violation of the Kellogg-Briand pact would let responsibility of the individual to wage war fall under the sphere of criminal law. Hathaway, O. A., & Shapiro, S. J. (2017), *supra note 1, pp. 252 - 253*

[21] Hathaway, O. A., & Shapiro, S. J. (2017) portrayed the endeavours of Lauterpacht in opening the road to the criminalisation of war crimes and acts of aggression

[22] See Irvin-Erickson, D. (2016). Raphael Lemkin and the concept of genocide. University of Pennsylvania Press. pp. 1 -3; 138-150. See also Hathaway, O. A., & Shapiro, S. J. (2017), *supra note 1, p* pp. 249 - 250

[23] Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted by the Secretary-General, in Questions of International Criminal Jurisdiction (1949) UN Doc. A/CN.4/7/Rev.1, United Nations, New York.

The UNWCC was set up on 20 October 1943 in London to investigate war crimes and to study the questions of establishing an international court for the trial of the Axis war criminals[24].

By mid-1945, the United States had decided to proceed with the prosecution of the major Nazi officials. Robert H. Jackson on behalf of the US government went to London to prepare the work plan with the Allied representatives.[25] After weeks of discussions, that included debates on individual responsibility, state sovereignty, aggression, retroactivity, and the causes of war, on 8 August 1945 the governments of France, the UK, the US and the USSR concluded the agreement in London for the establishment of the first International Military Tribunal (IMT) to try war criminals of the European Axis.[26] The organization, jurisdiction and functions of the IMT were laid down in the London Charter[27]. The Charter provided for three categories of crimes rising to individual responsibility: crimes against peace, war crimes and crimes against humanity[28].

Mirroring the events in London, with respect to the Far Eastern situation and the Japanese war atrocities, on 26 July 1945, the Potsdam Declaration was issued by the governments of the Allied powers at war with Japan[29]. With reference to the Japanese, the Declaration provided that "stern justice shall be meted out to all war criminals"[30]. On 19 January 1946 General MacArthur, Supreme Commander of the Allied powers established the IMT for the Far East (IMTFE) to try individual persons charged "with offences which include crimes against peace"[31]. The provisions of the IMTFE Charter recalled those of the Charter of the

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24 Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948) in United Nations War Crimes Commission (UNWCC) (1943-1948) available at search.archives.un.org accessed on 25 January 2022. For further analysis see Schabas, W. (2014) The United Nations War Crimes Commission's Proposal For An International Criminal Court. *In Criminal Law Forum, Vol. 25, No. 1-2*, Springer Netherlands. pp. 171 – 189

25 Jackson, R. H. (1949). Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945 (Vol. 3080). US Government Printing Office.

26 Ibid.

27 International Law Commission. (1949). Historical Survey of the Question of International Criminal Jurisdiction (Memorandum Submitted by the Secretary-General). UN Doc. A/CN/4/7/Rev, 1 p. 4 and pp.18-21 of appendices 9 and 10

28 Article 6, The Charter and Judgment of the Nürnberg Tribunal, History and Analysis: Memorandum submitted by the Secretary-General. (1949) Formulation of the Nürnberg Principles. International Law Commission, A/CN/.4/5, New York.

29 Proclamation by the Heads of Governments United States, China, United Kingdom (26 July 1945) Potsdam Declaration.

30 International Military Tribunal for the Far East. Special Proclamation by the Supreme Commander of the Allied Powers at Tokyo (19 January 1946)

31 Article 5, Charter of the International Military Tribunal for the Far East (1946) Tokyo.

Tribunal in Nuremberg, with the exception of some substantive and structural difference that we will see in the next chapters.

San Francisco and London were the results of a revolution on the outlawry of war that started with the Paris Peace Pact. These two events marked the early stages of the development of international criminal law, but were particularly keen on the criminalisation of aggression, originally referred to as the crime against peace.

3. Lineaments of the development of international criminal law through the precarious balance between the Security Council and ICTs

As we can withdraw from the previous paragraph, the distinct roads that evolved from the aftermath of the world wars, both in London and San Francisco, were born out of a common will to secure international peace and security. Two responses different in nature were to convey towards a single universal desire. Despite the peculiarity of the post conflict momentum allowed for the two responses to converge, later context and global needs, changed the situation.

This paragraph will be articulated within three distinct historical moments, landmarks in the development of international criminal law (ICL). In line with the framework of the whole chapter, the three historical moments are: 1945, 1990s, and 1998-2000s.

This section wants to give a basic understanding of how the two routes that originated in London and San Francisco, despite diverging, have often overlapped and became co-dependent. This chronological analysis will also serve as an interpretation of the history of the dichotomy between peace and justice mirrored in the evolution of the powers, practices and functions of the institutional dimensions of ICL, meaning the International Criminal Tribunals (ICTs) and the Security Council (UNSC).

3.1. *Time-lapse of the 1945 global response*

As for the previous paragraph, the years around 1945[32] brought in the international stage two major developments: the establishment of the UN and the creation of the first international military tribunals.

New collective mechanisms against states' breaches of fundamental international values were in place. The birth of international criminal law established the precedent in terms of individual responsibility for war crimes, crimes against humanity and crimes against peace overtaking the traditional state-centric approach typical of international law. Violators of international law were eventually held accountable for committing heinous crimes. Victorious nations brought the individuals responsible for the atrocities of the war before the tribunals in Nuremberg (1945-46) and Tokyo (1946-48). The tribunal in Nuremberg opened its doors on 20 November 1945, where judges from the United States, Great Britain, the Soviet Union and France were ready to prosecute leaders and officials of the Nazi Party for their breaches to the international law of the time[33].

While Nazi leaders were tried in Germany, preparations to try Japanese war criminals in the Far East were in place. Basis for the *Asian* counterpart of the IMT was the Potsdam Declaration (1945) that asked for the *unconditional surrender* of the Japanese forces and for justice to be *meted out*[34].

The IMTFE appointed eleven judges from eleven victor's countries and tried twenty-eight high ranking Japanese officials involved in the p*lanning, preparation, initiation and conduct of the war*[35]. The counts of the indictment were mostly on crimes against peace, every defendant was convicted for waging war[36].

Always in 1945, the entering into force of the United Nations Charter, introduced a new system of collective security. The Charter prohibits the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

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32 In this research the starting point of the development of International Criminal Law is recognised with the establishment of the two tribunals in Nuremberg and Tokyo. It is the general landmark scholars and experts in the field use to the origins of the development of international criminal law.

33 The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Nuremberg (14 November 1945 - 1 October 1946). Nuremberg, Germany (1947). See also Christopher, R. (2017). 1. Power and Principle from Nuremberg to The Hague. In Power and Principle. Cornell University Press. pp. 20 - 25.

34 Potsdam Declaration (1945)

35 International Military Tribunal for the Far East, Judgment (4 November 1948). Japan in that time was under American occupation, and the US provided for funding and staff. The Tribunal in Tokyo in terms of subject matter jurisdiction was quasi-verbatim to that of Nuremberg but in terms of temporal jurisdiction it covered crimes that took place between 1931 and 1945. The emperor and his family were not indicted.

36 See International Military Tribunal for the Far East, Judgment (4 November 1948)

with the purposes of the United Nations"[37]. Differently from the outcome of the London Conference, the Charter does not provide for individual accountability for criminal conduct but granted the UNSC the power to respond to threats to the peace, breaches of the peace and acts of aggression[38].

The early stages of the new system of collective security and the development of the newly born body of international criminal law, were part of a series of efforts that were primarily aimed at attaining peace. Aggression was the key component of the wide body of peace projects of that time, prosecuted under the charges of *crimes against peace.*

Breaches of the peace, acts of aggression and crimes against peace were the connecting point and, to some degree, the juxtaposition between the two dimensions. However, the scope and definition of aggression had never been identified at that time, not in Nuremberg nor under the provisions of the UN Charter. The Nuremberg Charter defined crimes against peace as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing"[39]

Aggression and the waging of aggressive war were considered before then a legitimate act of state, that did not lead to individual responsibility. Holding individuals responsible for acts in the name of their state was one of the revolutionary aspects of Nuremberg.

In Resolution 95(I) of 1946 the UN General Assembly affirmed to recognise the principles of international law as enshrined in the Charter and in the Judgement of the Nuremberg Tribunal in relation to prosecutions for crimes against peace, war crimes and crimes against humanity. In 1950, the International Law Commission [40] codified these rules in the Nuremberg Principles.[41]

3.2. *The 1990s and the ad hoc Tribunals*

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37 Article 2(4), Chapter I, UN Charter

38 Article 1, Chapter I.

39 Article 6(a), Charter of the Nuremberg Tribunal (1945)

40 The International Law commission was established in 1947 by the United Nations. It marked another p in the progressive development of international law and in the search for security system that could foster and secure peace.

41 The Crime of Aggression – A brief History. History. The Global Campaign for the Prevention of Aggression. Available at https://crimeofaggression.info/history/ accessed on 23 December 2021.

In the years of the Cold War, international criminal justice remained silent, and the United Nations system froze. All the efforts of the post-wars were to some degree put on hold for nearly fifty years. Only the UN General Assembly (GA) and the International Law Commission (ILC) managed to bring forth some progresses. Besides the codification of the Nuremberg Principles, the ILC guided by the GA, drafted a *Code of Offences against the Peace and Security of Mankind* in 1947[42] that was adopted in its draft version in 1954 by the GA[43].

However, with the progressing of the cold war also this initiative froze. The code remained a draft and could not be approved until aggression was defined, in 1974. The works were finally resumed in the early years of the 1990s, when a working group was set up specifically to draft a statute for an international court.[44]

In the 1990s, developments in the field of international criminal law took a different trend from the legacies of Nuremberg and Tokyo. Focus on aggression and crimes against peace lost ground while human rights protection and individual justice gained attention.

In 1992, at a meeting of the heads of governments of SC members in New York, the president issued a statement claiming that "the absence of war and military conflicts among states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security"[45].

This statement marked the re-conceptualisation and determination of threats to international peace and security.

In 1993, the Security Council set up the first *ad-hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague for "the prosecution of persons responsible for [committing and ordering] serious violation of international humanitarian law" in the former

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42 Draft Code of Crimes Against the Peace and Security of Mankind (Part I), Summaries of the Work of the International Law Commission, International Law Commission (2015), available at https://legal.un.org/ilc/summaries/7_3.shtml accessed on 23 December 2021.

43 Ibid. See also Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954)

44 For a more detailed explanation of the various events and efforts, please see Draft code of crimes against the peace and security of mankind (Part II), Summaries of the Work of the International Law Commission, International Law Commission (2017) availbale at https://legal.un.org/ilc/summaries/7_4.shtml accessed on 23 December 2021. Including the Draft Statute for an international criminal court.

45 A Time of Change, Note by the President of the Security Council (31 January 1992) S/23500, p. 3. The responsibility of the Security Council in the maintenance of international peace and security, Decision of 31 January 1992 (3046th meeting), statement by the President.

Yugoslavia.[46] Although the tribunal enjoyed the legacy of the two World War tribunals and followed their principles, it differed greatly on several aspects. It run from 1993 to 2017 and was mandated to put on trial individuals responsible for grave breaches of international humanitarian law committed in the former Yugoslavia since 1991. It exercised jurisdiction over grave breaches of the 1949 Geneva conventions (art. 2), war crimes (art. 3), crimes against humanity (art. 5) and it was the first international criminal tribunal mandated to prosecute the crime of genocide (art.4) [47]. The tribunal lasted 24 years, running from 1993 to 2017[48].

The establishment of the ICTY was not an isolated act. On 8 November 1994, the Security Council established the International Criminal Tribunal for Rwanda (ICTR), based in Arusha (Tanzania) to prosecute "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states between 1 January and 31 December 1994"[49].

The two *ad hoc* tribunals were based on the principle of concurrent jurisdiction. However, due to their special nature and their mandate to restore and maintain peace and security in the Former Yugoslavia and Rwanda, they were granted primacy over the jurisdiction of domestic courts.[50]

The establishment of the two *ad hoc* tribunals by the SC as enforcement measure of Chapter VII was significant in many aspects. It was the first time since Nuremberg and Tokyo that international criminal tribunals had been established. It did not operate under the premises of victor's justice, they were created by the Security Council and all the UN member states

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46 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, International Tribunal for the Former Yugoslavia, adopted by Security Council Resolution 827 (1993)

47 Mandate and Crimes under ICTY Jurisdiction, International Criminal Tribunal for the former Yugoslavia, United Nations. Available at https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction accessed on 23 January 2021.

48 See Strategic Survey (1999) The evolution of international criminal law. Strategic Survey Issue. Vol. 100, No.1. Routledge. See also Meltzer, B. D. (1995). War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia. The Seegers Lecture. Val. UL Rev., 30.

49 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Statute of the International Tribunal for Rwanda. (8 November 1994) adopted by Security Council Resolution 955(1994).

50 Article 9, Statute of the International Criminal Tribunal for the Former Yugoslavia,; Article 8 Statute of the International Criminal Tribunal for Rwanda. For further reading see also El Zeidy, M. M. (2008). From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals. *International & Comparative Law Quarterly*, *57*(2)

had to cooperate. The Council's use of Chapter VII powers was unprecedented. Moreover, the measure was evidently not aimed at countering an aggressive war. The juxtaposition of the mandates of the Security Council and of criminal trials over crimes against peace as discussed in the previous paragraph, now overlaps trough matters of justice. The pursuing peace expanded its scope and the nexus to military threats was no longer a need. Different trends had emerged following the end of the cold war, with a clear manifestation of a re-conceptualisation of the scope of the SC powers.[51] The international community recognised that security was more than the absence of war, and the value of justice became part of the peace projects.

3.3. *1998 and the wake of the Twenty-first century*

As a *heir* to the works on a Code of Crimes against the Peace and Security of Mankind, the International Law Commission (ILC) established a working group (WG) in 1992 to make the idea of an international criminal court come true. In 1993, the ILC and the GA endorsed the draft statute adopted by the working group, submitted later in 1994[52]. Preparations for an international conference culminated in Rome on 17 July 1998 at the Conference for the adoption of the Rome Statute for an International Criminal Court.

Based in The Hague, the International Criminal Court (ICC) is the first permanent international judicial body to try individuals responsible for crimes of genocide, crimes against humanity, war crimes and crimes of aggression. It is a court of last resort based on the principle of complementarity, *supposedly* independent from the United Nations. Adopted by 120 States, the Rome Statute entered into force on 1 July 2002.[53] Despite being operational since 2002, the text of the Rome Statute went through a series of amendments in relation to the crime of aggression that eventually entered into force only in 2018.[54] The

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51 Kerr, R. (2001). International Peace and Security and International Criminal Justice. In The United Nations and Human Security (pp. 121-136). Palgrave Macmillan, London. Cases where Chapter VII was invoked for questions of justice and human rights had a nexus with international order and maintenance of peace and security. See Blewitt, G. T. (2006). The International Criminal Tribunal for the Former Yugoslavia and Rwanda. Justice for Crimes Against Humanity (Oxford: Hart Publishing, 2006). p. 146

52 See Draft code of crimes against the peace and security of mankind (Part II), Summaries of the Work of the International Law Commission, International Law Commission (2017) availbale at https://legal.un.org/ilc/summaries/7_4.shtml accessed on 19 January 2021.

53 Rosen, T. (ed) (2003). The influence of the Nuremberg trial on international criminal law. Robert H. Jackson Center. See also Understanding the International Criminal Court, International Criminal Court, available at https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf accessed on 23 December 2021

54 This aspect will be thoughtfully analysed in the next chapter.

crime of aggression, that will be extensively analysed in the next chapter, raised a series of disagreements and controversies during the negotiations in Rome. In 1998 no agreement over its definition was found. Eventually, the crime of aggression was enshrined in Article 5 of the Rome Statute together with the other crimes but jurisdiction over it was suspended until agreements over the definition and the conditions for the Court's exercise of jurisdiction were reached. In 2010, at the Review Conference in Kampala (Uganda), agreement was reached but jurisdiction was still on hold until the ratification of the amendment by 30 States and decisions on its activation were reached. The Court's jurisdiction over the crime of aggression was eventually activated on 17 July 2018[55].

The ICC was established to stand as an international and impartial institution, fostering justice, and encouraging the work of domestic courts. Yet, the Security Council plays an important role in relation to the ICC, preserving its primary responsibility in matters of international peace and security. It can refer situations to the Court in case of a threat to peace and security and can defer the Court's jurisdiction for periods of twelve months in case it sees it necessary[56]. If there is a situation that the SC understands to be detrimental to peace and security, it has the ability to defer it. Despite created as separate institution, outside the UN framework, the ICC is bound to, and supplements the aim of, the UN Charter. Operational paragraph 3 of the preamble of the Rome Statute[57] links the crimes under the jurisdiction of the court and threats to peace and security. The two institutions share common values, one cannot be only a tool for justice as much as the other cannot be a mere representation of the interest of peace.

The overlapping of the mandates and functions of the two institutions reaches a degree of tensions different from those of the early phases considered above. The interdependence between the two positions runs on a thin line between law and politics, and between the delivery of justice and the preservation of global peace.

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55 Crime of Aggression, Amendments Ratification. ASP information. Available at https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/pages/default.aspx accessed on 23 December 2021.

56 According to Article 13(b) and Article 16 of the ICCSt, the Security Council can refer and defer situations to the Court. The Court embeds the SC discretionary power of determinations under article 39 of the Charter.

57 Operative para 3, Preamble, ICCSt. "*Recognizing that such grave crimes threaten the peace, security and well-being of the world*". See also Krzan, B. (2016). International Criminal Court Facing the Peace vs. Justice Dilemma. International Comparative Jurisprudence, 2(2).

4. **International criminal law to promote international peace and security.**

In the *Policy Paper on the Interests of Justice* issued by the Office of the Prosecutor (OTP) in 2007, it is clearly stated that *the ICC was created on the premise that justice is an essential component of a stable peace*[58].

The various patterns of the history of international criminal law that led to the creation of the Statute of the ICC were born out of a broad genus of peace projects[59] in response to the universal longing for peace and security and the eradication of war that had just devastated the world.

One of the main rationales behind the development of international law is to regulate and eradicate violence and to reach long lasting peace.[60] In its normalizing effect, law is meant primarily to establish peace.

The famous sentence held at the tribunal in Nuremberg, often cited by scholars in justifying the passage from state-centric to individual-centric international law, claimed that "crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[61]. Following a logical deduction, prosecuting individual perpetrators contribute to the pacifying effects of international criminal justice.

In the anomalous circumstances of the closing phase of the Second World War, peace was undeniably preferred over war, and the experiment of prosecuting crimes against peace was its main judicial response. The aim of the trials in Nuremberg and Tokyo, besides upholding justice moral values, was primarily the restoration and maintenance of peace and security epitomised by *crimes against peace* as the fundamental charge.

Justice and peace are the two main juridical and moral values that evolved from the institutional phenomena of the second half of the twenty-century. Despite justice is intrinsically part of the peace cause, peace gets a higher hierarchical status over justice, matured as ultimate goal for the well-being of the international community. As a matter of

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58 Policy Paper on the Interests of Justice (2007), Office of the Prosecutor, International Criminal Court. at 6(b) p. 7

59 Mégret, F. (2018). International Criminal Justice as a Peace Project. European Journal of International Law, 29(3). p. 835

60 Kunz, J. L. (1951). Bellum justum and bellum legale. American Journal of International Law, 45(3), p. 533.

61 International Military Tribunal (Nuremberg 1947) Judgement and sentences, American Journal of International Law, vol. 41, p. 221.

fact, the preamble of the Rome Statute gives the Court jurisdiction over crimes that threaten peace, security and the well-being of the world. Justice is essential to avoid war and reach peace, and peace and security *are essential to achieve justice*[62]. It is a mutually reinforcing mechanism.

However, how can the prosecution of individuals deliver pacifying effects? What is the point of connection? Prosecuting individuals for perpetrating crimes works both as deterrent and retribution for victims. In fact, retributive justice is one of the transitional justice mechanisms used in post-conflict societies to produce a deterrent force against further violence, promote political stability, fulfil moral obligations, foster justice and uphold peace[63]. Prosecuting those at the vertices of the atrocities is a sort of guarantee for their not reappearance on power and would impede feelings of revenge that often characterize the victims of the atrocities. The non-resurgence of the totalitarian war regimes can be considered one instance of the potential deterrent effects of prosecuting their leaders. The post-wars transitional context was nonetheless unique, and the products of that time cannot be taken as a model for all post-conflict situations.

Given the still narrowed practice of the ICC, it is better to give a closer look at the respective jurisprudence of the *ad hoc* ICTs. Notwithstanding the differences between those judicial institutions, they always deal with retribution and deterrence[64].

Established by the Security Council, Chapter VII powers granted the ICTY a clear function to contribute to peace and security in the Balkans. Same for the Tribunal in Rwanda. The prosecution of individuals responsible for grave violations of international humanitarian law was integral part of the peace process both in the former Yugoslavia and in Rwanda. Besides delivering justice, the *ad hoc* tribunals were vehicles to peace.[65]

Yet, the achievement of peace through justice institutions is challenged by the struggles that arise to find the balance between the demands of justice and the political constraints that every situation creates. In certain cases, punishment and prosecution through criminal justice may endanger peace processes instead of fostering them. They can become more of a

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62 Kunz, J. L. (1951), *supra note 60,* pp. 528-534 Levshin, A. (2015). Jus Contra Bellum in the Modern States System: Observations on the Anomalous Origins of the Crime of Aggressive War. St Antony's International Review, 10(2).

63 Political stability can be better guaranteed when victims do not seek revenge on their own.

64 Krzan, B. (2016). *supra note 57.* p. 82

65 Blewitt, G. T. (2006). *supra note 51*. p. 146

destructive force than a constructive one hampering the achievement of peace[66]. The identification, trial and prosecution of a person criminally responsible internationally is context-dependent for every single situation or case. Peace processes, conflict resolutions, dispute settlements, justice demands are subjective to cultural and legal traditions of each context and situation[67]. The relationship between the SC and the ICC in referring and deferring situations or cases, rely very much on these assumptions.
An approach that insists on prosecution to pursue peace is likely to jeopardise prospective cooperation for political solutions, challenging its function as means to peace and security[68].

4.1. *Tensions between law and politics et la raison d'être of the ICC and the Security Council.*

The potential tensions between peace and justice may be considered yet another echo of the debate on the goals and means of international criminal justice just touched upon.
The mandates of the international military tribunals and international courts established since the end of the world wars experienced a degree of changes in their scope and aim that cannot be overlooked. The context in which they developed, part of the unique evolution and fluctuations of the international order in the twentieth century, led to a changing in needs, priorities and values of the global community that shaped the nature of the tensions between law and politics, justice, and peace.
In this paragraph, such tensions will be constructed on the same three-time phases framed in the first paragraph of this Chapter.

4.1.1. 1945: Time-lapse of Realpolitik

66 Scanlon, H., & Pillay, S. (2007). Peace Versus Justice? Truth and Reconciliation Commissions and War Crime Tribunals in Africa. This can be traced back in reference to the establishment of the South African Truth and Reconciliation Commission.

67 See Huyse, L. and Salter, M. (eds.) (2008), Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences. Stockholm. International Idea. p. 5

68 The International Criminal Court tends to describe its legal practices as balanced between retributive and restorative justice, for which the latter evolved through the developing framework of victim participation in legal proceedings. Report of the Court on the Implementation (2013) Revised Strategy in Relation to Victims, Assembly of States Parties International Criminal Court, ICC-ASP/12/41 para. 28

As already illustrated, the setting up of military tribunals to prosecute leaders in reaction to the atrocities of the second world war reflected the choice of that time to prioritize demands for accountability for those at the vertices of the atrocities. Heads of states were no longer immune, the defence on obedience to superior orders was eliminated, and politics left some ground to law and justice.[69] Yet, the degree of realpolitik involved in most of the endeavours of that time was conspicuous.

The prosecution process between the IMT and the IMTFE differed greatly due (mostly) to the extent of realpolitik pierced in each process and context. In Nuremberg the allies set up domestic tribunals in the zones of occupation in Germany. In the Far East, aside from the trials in Tokyo, perpetrators were tried in other countries and citizens jailed in different places. In the meantime, the United States led the Allies in the occupation of Japan and enacted a series of political, military, and socio-economic reforms.[70]

The Japanese on the side of the US, supported the UN during the Korean War[71], and Japanese prisoners of war were all released by 1956.[72] In return, two of the major war criminals became Prime Minister and Minister of Foreign Affairs of Japan, and the Japanese Emperor was never charged with crimes against peace despite his position at the vertices during the war. The Asian culture in general tends to be highly vulnerable to humiliation, and in this specific context Japanese culture worked as perfect vehicle for political arrangements to happen. Japan was suddenly defeated, occupied and its leaders prosecuted. It shifted from being a conqueror to be conquered. The international humiliation that the Japanese experienced allowed the United States and relevant alliances to harshly manipulate them.

This proves the degree of political strategy that was involved in criminal prosecutions since the very early stages of the development of international criminal tribunals, at the expenses of accountability. Criminal justice, mainly in the Far East, grew intertwined with political realism and *realpolitik.*[73] This is still swaying into today's approach of certain Asian cultures to international criminal law.

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69 Bassiouni, M. C. (2003). Justice and Peace: The Importance of Choosing Accountability over Realpolitik. Case W. Res. J. Int'l L., 35, 191.

70 Occupation and Reconstruction of Japan (1945–52) Office of the Historian, US Department of State available at https://history.state.gov/milestones/1945-1952/japan-reconstruction accessed on 23 December 2021.

71 Ibid

72 There were exceptions in the release of the Japanese Prisoners' of War (POWs) by the Soviet Union, that slowly released them until the 1990s.

73 Bassiouni, C. (2003) *supra note 69.*

4.1.2. The 1990s: Teachings of the *ad hoc* tribunals[74]

At the time of the ad hoc tribunals, the political agenda was particularly intense and the political balance that the tribunals had to perform was delicate[75]. The two tribunals proved how politics could support as much as limit international criminal justice and determine its ensuing contribution to peace.

The need to find the balance between prosecuting those at the vertices while negotiating political settlement was at stake. The tribunals were established as a measure for peace and security, but their scope and approach were different from previous judicial effort aimed at peace and security. The relationship between the interest of peace and the interests of justice was therefore particularly tense. While justice can be pivotal in achieving and maintaining peace, the administration of justice at the international level can also become highly detrimental.[76]

There is no doubt that the ICTY contributed to the eradication of the culture of impunity for massive abuses. The indictment of R. Karadžić, Bosnian Serb leader, and R. Mladić, military commander of the Bosnian Serb army, removed them from power positions. The two tribunals proved that criminal prosecution for international crimes is possible. Yet, the ICTY in the short term did not stop the war from happening. Atrocities continued also during the establishment of the court. Only coercive political strategies, the support of powerful states and of international institutions could weaken the regimes. Similarly, the ICTR proved that the impact that ICL has on peace rests on the political predisposition of the state victim of international crimes and on the predisposition of the same state to international cooperation.[77]

The two *ad hoc* tribunals had shown how contribution to peace is highly entrenched in national and international political commitments.[78]

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74 For further readings see Cassese, A. (1998). On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law. European Journal of International Law, 9(1).

75 Newman, E. (2001). The United States and Human Security. Springer.

76 Newman, E. (2001). *supra note 75*, pp. 130 -131

77 Rodman, K. A. (2016). How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR. American Journal of International Law, vol. 110. p. 234 and p. 239. For additional insights, please see Whaley, Z. B. (2009). Timing Justice: Lessons from the Tribunals in Yugoslavia, Rwanda, Sierra Leone, and Cambodia.

78 Rodman, K. A. (2016). *supra note 77.* p. 239

4.1.3. A leap forward into the XXI century

Today's institutionalisation of tensions between law and politics, despite different in nature due to the wide array of geopolitical historical transformations is mirrored in the activities of the Security Council and of the International Criminal Court with a certain degree of overlap of their respective Charter and Statute, mandates and operations. The Rome Statute recognises the interdependence and complementarity of the two institutions, political and judicial, in relation to the crimes under the jurisdiction of the court.

As seen, the ICC is a judicial institution, whose core judicial mandate is to act as court of last resort to try individuals, not States, for the most serious international crimes when national jurisdictions are unable or unwilling to do so. It is complementary to national systems and dependent upon states. The ICC wants to attribute to justice first role in response to abuses.

The nexus of the Security Council with the ICC, and the Council's power to refer and defer situations overlap with the ICC primacy in the administration of justice. If there is a situation that the SC understands to be detrimental to peace and security, it has the ability to defer it. Even more controversial, are the various roles that the Security Council play in the prosecution of crimes of aggression (this will be comprehensively illustrated in the next chapter on the crime of aggression).

Ground for many debates is the fact that the ICC was born as an independent body, out of the UN framework, but has no choice but to rely on a certain degree of dependency with the Security Council.

It is a matter wrapped in contradictions. On the one hand, a closer relationship between the power politics of international political bodies such as the UN Security Council and the ICC diminishes the legitimacy of an independent judicial body in delivering justice. On the other hand, without cooperation between such political bodies, or more broadly without pursuing justice through power politics, some of the worst international crimes would have never been tried. As well, on the one hand the universality of the quest for a judicial guarantee for the restoration and maintenance of peace and security requires an international body such as the ICC to operate entailing the approval of the major world legal systems. On the other hand, the subjectivity of the parts involved challenges the functions of such institution.

4.2. *Is the ICC a judicial guarantee or an obstacle to peace and security?*

Various are the debates surrounding the dilemma on whether the ICC actually functions as judicial guarantee for peace and security without being an actual obstacle to it. Justice mechanisms at the international level fall into a complex machinery of inherent strains in relation to culture, politics, and diplomacy that may hamper peace processes in various ways. Michael Reisman sees "wars in former Yugoslavia provid[ing]acutely painful examples of the limited utility of war crimes tribunals for stopping wars and making peace".[79] In his assertion, he goes straight onto the assumption that prosecuting individuals responsible for grave crimes in the name of the rule of law and human rights promotion, cannot in itself ensure peace and security.

Despite the administration of justice is integral to peace processes and can become fundamental in the preservation of human security, as Rachel Kerr also confirms, the tensions that it creates in a setting of sovereign and independent states as the one existing today may become difficult to solve[80].

Looking at the history of the twentieth century, ICL exercised a considerable weight in the post war peace processes, including the non-resurgence of the fascist regimes both in Europe and Asia. The prosecution of individuals in those years set the standard for what is to be considered supposedly right and wrong, and placed crimes against peace at the centre.

Nevertheless, those effects and guarantees were part of a unique post-war context. The new approach that ICL brought about at its early stages, could not have the same resolution and outcome in different circumstances. Kirsten Sellars and Gerry Simpson held their critics about the naïveté of the post-wars world. They defined crimes against peace as cardinal peacemonger. Kirsten Sellars called it a World War II *experiment* and *anomaly*[81] and Gerry

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79 Reisman, W. M. (1998). Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics. Tul. J. Int'l & Comp. L., Vol. 6 No. 5. p. 46. Wars in former Yugoslavia gives prove to a certain degree of the limited impact that war crimes tribunals have to end wars and restore peace.

80 Kerr, R. (2001), *supra note 51.*

81 Sellars, K. (2013). Crimes Against Peace and International Law (Vol. 97). Cambridge University Press. p. 259. see also Simpson, G. J. (2007). Law, War and Crime: War Crimes, Trials and the Reinvention of International Law. Polity.

Simpson defined it *controversial* being the use of force a tool sovereign countries may likely be *unwilling to entirely disavow*[82].

In case of a systematic use of ICL the focus on individuals to be held accountable may result effective for specific phenomena but it may risk transcending a wider context. Koskenniemi argues that criminal trials tend to *forget* larger systematic factors. Politics, economics and the social sphere in which certain events occur, are essential elements that should be taken into account to secure effective peace efforts.[83]

The heterogeneity of the various international contexts often requires compromises more than one single means. And, if this one single means contains loopholes it may become more detrimental than beneficial to the achievement of lasting international peace and security.

The delicate balance that international courts and tribunals need to find in the interplay with different legal systems and domestic institutions is also subject of concern. As Antonio Cassese expressed, an International Criminal Tribunal can be a *giant without arms and legs* (…) *[I]t needs artificial limbs to walk and work. And these artificial limbs are state authorities*[84].

This is not to say that ICL holds more negative than positive features, but to unveil the high costs, difficulties and controversies the ICTs involve mainly taking into account that they operate in a highly political international community[85].

All this does not mean that ICL is necessarily an obstacle to peace. Judicial processes create precedents. Holding people accountable create pressure on leaders. The deterrent effect that a Court of this kind may bring may likely change the behaviour of oppressors and perpetrators that have to adjust to the international order. Without an established justice system, long-term instability and conflict have more space to arise.

5. **Conclusion**

New logics of interstate relations had populated the new world order established with the end of the two atrocious world wars. The struggles humanity suffered brought radical

82 Simpson, G. J. (2007) *supra note 81,* p. 152

83 Koskenniemi, M. (2002). Between impunity and show trials. *Max Planck Yearbook of United Nations Law*, *6*(1), 1-32.

84 Cit. Cassese, A. (1998). *supra note 74.* 2-17. p. 13

85 Newman, E. (2001), *supra note 75.*

changes in world rules, culminated in the outlawry of war in response to the universal desire to enjoy peace and security.

The two trends (those originated in San Francisco and London) that developed out of the public will of that time were born with the common goal to prevent states from waging aggressive wars in order to secure long-lasting peace. The focus on aggression and crimes against peace was the juncture of the two institutional paths.

While the UN system in its years of operation has provided for the development of collective security mechanisms, the attention that ICL gave to the individuals, both in terms of prosecuting those responsible, and in terms of moral values in a new teleology of victim focus, led enthusiasm on human rights protection and justice grow. It became clear at a certain point that lasting peace could not be achieved only by the mere absence of war, but it implies a series of qualitative changes to bring the society to a new status quo.

Nevertheless, prosecution does not necessarily foster peace, it may actually have certain effects that pull in opposite directions, acting as deterrent while resulting in protracting atrocities. While the tribunals in Nuremberg and Tokyo could be considered limited in scope due to the unique transitional context they were in, ICL experienced a proper exponential growth in the 1990s. At this time, debates on its value in peace processes and stability became fierce.

The establishment by the Security Council of the two *ad hoc* tribunals, and the adoption of the Rome Statute for an international criminal court in 1998, had promoted a new rhetoric of justice in governing the international community, that has become commonplace in the international political arena. The world order, as we know it today, is based on the rule of law but conflicts still need to be solved with political means. The expanded concept of international peace and security that holds in itself elements of justice and human rights, creates inherent tensions with the core values of the international system in terms of state sovereignty and non-intervention on national matters hampering the actual delivery of peace and security.

As for today, international criminal law is understood as being part of a wide body of justice projects. The inclusion of highly political elements in this body of law, that touches upon the fundamental principle of state sovereignty together with the substantial weight that the Security Council holds, explain the struggles that the negotiations of certain crimes had undergone.

Understanding these features will help us place the controversies over the crime of aggression in its specific setting and explain the long way to Kampala and after, until the activation of the court's jurisdiction over such crime.

CHAPTER II

The Normative Development of the Crime of Aggression: a Foucault pendulum between law and politics

1. Introduction

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6. What is it the crime of aggression? Concluding remarks

1. **Introduction**

With the closing of the Diplomatic Conference in Rome for the establishment of the International Criminal Court (1998), the adoption of the Rome Statute provided for the new Court's jurisdiction over the crime of aggression but postponed its definition and enforcement until 2010. The Kampala Review Conference on the Rome Statute took place in Kampala from 31 May to 11 June 2010 and concluded with the adoption of the definition of the crime of aggression. In December 2017 the Assembly of States Parties adopted a resolution aimed at the activation of the Court's jurisdiction over the crime of aggression that occurred only on 17 July 2018.

This chapter seeks to chronologically outline the development of the crime of aggression so to elucidate on the terms of the debate over a crime that fully embodies the dichotomy justice and maintenance of peace and security.

Choosing the interwar years as the earliest stage of the development of the crime, the chapter will show how crimes against peace first, and aggression later, made their way onto the lexicon of international law. This chapter therefore will touch upon the endeavours of the tribunals in Nuremberg and Tokyo, the unfolding of the works of the General Assembly, the efforts of the International Law Commission and that of the various Special Committees leading up to the negotiations in Rome and later in Kampala.

A substantive analysis of the codification of the crime will look first at the negotiations for the creation and implementation of crimes against peace and, at a later stage, at the interplay between the International Law Commission (ILC), the General Assembly (UNGA), the International Court of Justice (ICJ) and the Security Council throughout the codification process of the crime.

Despite the overlapping time of their work on aggression, the research analyses the ILC's work on the Draft Code of Offences against the Peace and Security of Mankind and on the Draft Statute for an International Criminal Court distinctly from that of the General Assembly.

2. **Early stages in the development of the crime of aggression.**

2.1. *From Versailles and Paris*

When drawing a timeline to understand the roots of the crime of aggression, some scholars venture on such a long record of events tracing back to the Hohenstaufen rule in the XIII century, when Conradin von Hohenstaufen was put on trial by his own nation's court in Naples and later executed for initiating an unjust aggressive war[1]. The scope of this research does not need to go this far back.

Early attempts of attribution of responsibility to individuals for criminal acts as authors of the war came with the end of the first World War. At the Preliminary Paris Peace Conference in 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was mandated to investigate over the events that took place during the war. Findings would have helped to determine whether prosecution could be carried out on the basis that responsibility for the waging of the war lied on "*the Powers which declared war in pursuance of a policy of aggression characterised by a dark conspiracy against the peace of Europe"*[2]. A tribunal could then be established. The attention the Commission gave to personal responsibility regardless of the ranking of the alleged member of the enemy forces was breakthrough[3]. This meant that violations of the laws and customs of war (or the laws of humanity) could trigger individual liability regardless of the hierarchical position of the alleged offender, if the designated tribunal determined it. The Commission believed that the attribution of liability to an individual for acts that were considered lawful at that time could be justified on account of the *inhuman* and *reprehensible* nature of those acts that were carried out with *wantonness or gratuitous malice*[4]. The Commissions' attitude resulted in a series of objections and controversies linked to the preservation of the principles of sovereignty and *nullum crimen sine lege*. The creation of a precedent in prosecuting a head

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1 Please see Waterlow, J., & Schuhmacher, J. (2018). War Crimes Trials and Investigations: A Multi-Disciplinary Introduction. Springer. p. 29. See also Cryer, R., et al. (2014). An introduction to international criminal law and procedure. Cambridge University Press. p. 307, footnote 1.

2 Cit. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1920) American Journal of International Law vol. 14, no. ½. p. 98

3 *"the degree of responsibility for these offences attaching to particular members of the enemy forces … however highly place"* Ibid. p. 116

4 Ibid. p. 150-151

of state could translate into a legitimised breach to national sovereignty. The United States were for instance one of many that opposed to the idea of an international criminal court to try individuals, as it considered that such solution was a threat to state sovereignty[5]. On 28 June 1919 the Treaty of Versailles was signed, the conflict officially concluded and the terms of peace between the Allies and Germany were arranged[6]. Germany was held responsible for waging aggression against the Allied and Associated Governments[7] and was called for territorial demilitarization[8] and reparation payments[9]. The work of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was reflected in articles 227 - 231 of the Treaty of Versailles providing for the establishment of a special military tribunal to try the Kaiser on war crimes charges[10]. Within the meaning of the provisions the concepts of individual responsibility, criminal trial, prosecution of *supreme offence against international morality and the sanctity of treaties,* war, and aggression were introduced. Article 227 of the Treaty reads:

"The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan" [11]

The word aggression does not yet appear in the wording of Article 227. However, drawing from article 231 of the Treaty the *war* imposed by the *aggression of Germany and her allies*[12] is the *supreme offence* as intended by it. Despite the Kaiser fled to the Netherlands and was therefore never tried, war crimes trials took place at the highest court of Germany in Leipzig between 1921 and 1922 prosecuting seventeen Germans[13].

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5 Ibid. p. 145
6 Treaty of Peace with Germany (Treaty of Versailles), https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf, accessed on 16 September 2021.
7 Ibid. art. 231
8 See for instance Ibid. artt. 38, 43, 52.
9 See Ibid. Artt. 125-126; Art. 145, Artt. 232 – 238; Articles in Part IX Financial Clauses.
10 See Ibid. art 227 - 228
11 Ibid. Art. 227
12 Ibid. Art. 231
13 See Report of the Proceedings before the Supreme Court in Leipzig with appendices (1921), German War Trials, London. See Hankel, G. (2016) Leipzig War Crimes Trials, in 1914-1918-online. Freie Universität

The years running from the end of World War I and the starting of World War II saw a series of efforts aiming at condemning recourse to war to solve international disputes and at redesigning the legal thinking of the international community accordingly in the name of world peace and security. A wide array of multilateral treaties flourished out of this common sentiment.

On 28 June 1919, the Covenant of the League of Nations framed on the first twenty-six provisions of the Treaty of Versailles, was signed and the League of Nations was established.[14] Articles 10-16 of the Covenant covered aggression[15], war or threat of war[16], and the establishment of a permanent court of international justice for judicial settlement of disputes.[17] Articles 11, 13 and 16 represented an attempt to implement mechanisms that could give effective and immediate responses to the starting of a war, or a threat thereof, in order to frustrate or at least contain the attack. Instances of procedural obstacles to warfare were to summon an emergency meeting of the Council (article 11), to submit the dispute to arbitration or judicial settlement (article 13), to block financial and trade intercourse with the aggressor state that could also be removed by the league by consensus (article 16). The Covenant of the League became the source of a new international regime of accountability for violations of the prohibition of the use of force. The prohibition on the use of force was binding upon states parties to the League and breaches to the prohibition resulted into the application of penalties.[18] In 1923 the League of Nations prepared the *Draft Treaty for Mutual Assistance* declaring in Article 1 that "aggressive war is an international crime".[19]

Of key relevance was the *Protocol for the Pacific Settlement of International Disputes*, also known as the *Geneva Protocol*[20] adopted in 1924 that characterized war of aggression as a

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Berlin. For further insights on the Leipzig trials and on the post WWI International War Crimes Trials see Kramer, A. (2006). The first wave of international war crimes trials: Istanbul and Leipzig. European Review, 14(4), 441-455; and Neuner, M. (2014) When Justice Is Left to the Losers: The Leipzig War Crimes Trials, in Morten Bergsmo, M., Cheah, W.L., Yi, P. (Eds.) (2014) Historical Origins of International Criminal Law. Vol. 1, FICHL Publication Series No. 20, Torkel Opsahl Academic EPublisher, Brussels.

14 See League of Nations, Covenant of the League of Nations (28 April 1919). available at https://www.refworld.org/docid/3dd8b9854.html accessed on 16 September 2021

15 Ibid. Art. 10

16 Ibid. Art. 11

17 Ibid. Artt. 12 -16

18 See Ibid. Artt. 16 - 17

19 Article 1, Text of the Treaty of Mutual Assistance, in Report of the Third Committee to the Fourth Assembly, Reduction of Armaments, League of Nation, Library Archives https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-659-M-262-1923-IX_EN.pdf

20 Garner, J. W. (1925) The Geneva Protocol for the Pacific Settlement of International Disputes, American Journal of International Law Vol. 19, No.1

"violation of [the solidarity of the members of the international community] and an international crime".[21]

In 1927 the League of Nations adopted a resolution, namely the *Declaration Concerning Wars of Aggression,* endorsing the recognition of a war of aggression as an international crime, and in paragraph 1 declared that "all wars of aggression are, and shall always be, prohibited".[22] On the same trend, the Havana Resolution enacted by the Sixth Pan-American Conference on February 1928 submitted that *inspired by solid cooperation for justice,* war of aggression constituted *an international crime against the human species,* and *aggression is considered illicit and as such declared prohibited*[23]. On 17 August 1928, the Kellogg-Briand Pact bounded sixty-three states to the progress of international law towards the outlawry of the use of force to settle international disputes[24]. The Kellogg-Briand Pact (original name *General Treaty for the Renunciation of War as an Instrument of National Policy,* also known as the *Pact of Paris*), despite being considered the most relevant of the interwar efforts, remained a relatively broad and weak instrument. In 1933 three conventions on the definition of aggression were signed in London. The first was signed on 3 July 1933 by Romania, Estonian Republic, Latvian Republic, Polish Republic, Turkish Republic, Persia, USSR, Afghanistan and Finland[25]. The second one was signed the day after, on 4 July 1933, by Romania, the Union of Soviet Socialist Republics, Czechoslovakia, Turkey and Yugoslavia and was identical to the previous one but for article IV which provided for adherence to all countries and not just to the high contracting parties[26]. On 5 July 1933 a third Convention defining aggression was signed by the USSR and Lithuania, similar to the previous ones but with explicit references to the Kellogg-Briand Pact and to the Soviet-Lithuanian Pact of non-aggression concluded in 1926[27]. The first one, also known as the

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21 *Preamble*, Protocol for the Pacific Settlement of International Disputes, League of Nations (2 October 1924)

22 Para (1), Declaration Concerning Wars of Aggression (1927) in The Travaux Préparatoires of the Crime of Aggression (2012) Barriga, S. and Kress, C. (eds.) Cambridge University Press, at 7.

23 1928 Havana Resolution, The Travaux Préparatoires (2012) *supra note 22,* at 8.

24 See Yearbook of the International Law Commission (1976) 28th session, part. 2 A/CN.4/SER.A/1976/Add.l. p. 101 at 14

25 See No. 3391 *Convention for the Definition of Aggression* (3 July 1933) London. Available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20147/v147.pdf accessed on 16 December 2021

26 No. 3414 *Convention for the Definition of Aggression* (3 July 1933) London. Available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20148/v148.pdf accessed on 16 December 2021

27 See *USSR-Lithuania: Convention Defining Aggression, in Convention Defining Aggression* (1933) (American Journal of International Law vol. 27 No. 4) p. 195. For the 1926 Treaty of Non-Aggression see

Soviet Convention, contained the Soviet Draft Definition of Aggression and became very relevant at the negotiations in London between 1943 and 1945 for the establishment of the first international military tribunal (see later in this chapter)[28].

Notwithstanding all the efforts to promote the prohibition of the use of force amongst states and the attempts to also include the individual dimension of international responsibility for the waging of aggressive wars, the legal and judicial climax necessary to create a precedent and to establish a new regime of international responsibility was never reached.

The whole apparatus that was setting into motion in the interwar years in relation to the development of a new legal regime to regulate the use of force in international relations remained almost silent until the outbreak of World War II.

In response to war atrocities, efforts were resumed in the early 1940s to develop a new system of collective security and restore peace.

Aggression was part of the two institutional designs that stemmed from these efforts: the United Nations Conference on International Organisations in San Francisco (1945) that concluded with the establishment of the United Nations and, the International Conference on Military Trials in London (1945) and the drafting of the Charter of the International Military Tribunal.

2.2. *to San Francisco*

On 14 August 1941 the President of the United States Roosevelt and the British Prime Minister Churchill issued the Atlantic Charter. It was a joint declaration framed in eight points that expressed hope for order and security, freedom from fear, the need to abandon the use of force and disarm aggressor nations as essential step to restore and maintain long-lasting peace[29]. On 1 January 1942, the allied nations met in Washington to pledge their support to the Atlantic Charter. The Charter's principles were endorsed in a new joint declaration adopted on the same day.[30] On 30 October 1943, the United States, the United

USSR-Lithuania:Treaty of Non-Aggression and Neutrality (1926), in U.S.S.R.--Lithuania: Treaty of Non Aggression and Neutrality (1933) (American Journal of International Law vol. 27 No. 4) p. 184

[28] See 1933 Soviet Draft Definition, in Travaux Préparatoires (2012), *supra note 22,* at 10.

[29] See the *Atlantic Charter* (14 August 1941), by the President of the United States of America, Roosevelt, F.D. and the Prime Minister of the United Kingdom, Churchill, W.L.S.

[30] *Declaration by United Nations* (1 January 1942) Washington D.C. Signed by 26 governments: the United States, the United Kingdom, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti,

Kingdom, the Soviet Union and China met at the Moscow Conference and issued the *Joint Four-Nations Declaration*[31] that affirmed the necessity to establish an "international organization based on the principle of the sovereign equality of all peace-loving states, for the maintenance of international peace and security"[32]. To carry out their *united actions,* the four powers met at Dumbarton Oaks in Washington in 1944[33] and began to consider a series of proposals to lay out the structure of the future organization.[34] The Dumbarton Oaks proposals formed the basis for the drafting of the United Nations Charter.[35] In February 1945, the heads of state of the United States, the United Kingdom and the Soviet Union, with victory within grasp, met in Yalta to discuss the fate of the post-war world and summoned the allied governments to send delegations to San Francisco to finalize the efforts for the establishment of the international organization.[36] On 1 March 1945, addressing the Congress on the Yalta Conference, Roosevelt affirmed,

"A conference of all the United Nations of the world will meet in San Francisco on April 25, 1945. There, we all hope, and confidently expect, to execute a definite charter of organization under which the peace of the world will be preserved and the forces of aggression permanently outlawed."[37]

Aim of the future organization was the maintenance of peace and security. The Security Council was the primary body in charge of this mandate and was given a wide degree of authority.

Chapter VIII, section B of the Dumbarton Oaks proposals attributed to the Security Council the responsibility to determine the existence of aggression or any threat to peace and to take the necessary measures to restore and maintain peace and security[38]. The original proposal

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Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa and Yugoslavia.

31 *Joint Four-Nation Declaration* (October 1943) Moscow Conference

32 Article 4, Joint Four-Nation Declaration (October 1943) Moscow Conference.

33 See the *Washington Conversations on International Peace and Security Organization* (Dumbarton Oaks Conference or, Dumbarton Oaks Conversations) (21 August – 07 October 1944) Washington D.C. by United States, United Kingdom, Soviet Union, and China.

34 Ferencz, B. B. (n/d) *Defining International Aggression*. The Search for World Peace. A Documentary History and Analysis (Vol. I) New York: Oceana Publications. p. 37

35 See The Dumbarton Oaks Proposals for a General International Organization (1945), Document 17(a), in Ferencz, B.B. (n/d), *supra note 34.*

36 Yalta Conference (code-named Argonaut) (4-11 February 1945)

37 Roosevelt, F. D. (1 March 1945) Address to Congress on the Yalta Conference (Online by Peters, G. and Woolley, J. T.) The American Presidency Project. Available at https://www.presidency.ucsb.edu/node/210050 accessed on 1 December 2021.

38 See Chapter VIII, Section B, paragraphs 1 and 2, The Dumbarton Oaks Proposals for a General International Organization (1945).

was drafted by the United States and did not include the wording *acts of aggression*. Reference to aggression was introduced only later by China and the Soviet Union.

This became subject of discussions at the United Nations Conference on International Organization in San Francisco (April 25 - June 26 1945) that followed the closing of the Dumbarton Oaks Conversations (October 1944). Considering the proposed role of the Council to determine aggression, the relevant Committee in San Francisco that was established to work on enforcement arrangements in relation to the Security Council had to return upon the issue of defining aggression. The members of the Committee gave extensive consideration to the question of defining aggression. Various proposals were presented. The four major powers proposed to include an amendment that could address any failure of the Council to comply with its responsibilities to determine the aggressor state in order to restore peace.[39]

Major opposers to the drafting of an explicit definition of aggression in the Charter were the United States and the United Kingdom. To find an all-inclusive and exhaustive definition was too complicated and the risk to set up standards that the aggressor may escape raised many concerns.[40] Discussions concluded with the omission of any definition of aggression from the Charter. The determination as to what constituted aggression was set upon the Council's discretion.[41] The Dumbarton Oaks proposals that charged the Council of the responsibility to determine the existence of an act of aggression became article 39 of the future Charter of the United Nations.

Extensive consideration in San Francisco was given to the obligation of states to refrain from the use of force in international relations. The final version of the provision that prohibits the use of force, article 2(4) of the Charter, drew largely from the Australian and New Zealand amendments to the Dumbarton Oaks proposals. The Australian proposal included the territorial integrity clause according to which the prohibition on the threat or use of force protects the territorial integrity of a State[42]. New Zealand proposed to engage collective

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39 See Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union, and China (5 May 1945), Doc. 2 G/29, at The United Nations Conference on International Organization (1945). Available also in Ferencz, B. B. (n/d), *supra note 34,* Document 17(f),

40 Hearings before the Committee on Foreign Relations (10 July 1945) 79th Congress, 1st session, on the Charter of the United Nations, submitted by the President of the United States on 2 July 1945 (as cited in Pecorella, G. (2021) The United States of America and the Crime of Aggression, Routledge, p. 93)

41 Ferencz, B.B. (n/d), *supra note 34,* p. 39.

42 Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia (5 May 1945), in Documents of the United Nations Conference on International Organization (UN.C.I.O.), San Francisco (1945), Doc. 2 G/14 (1), Vol. III, p. 543

action in response to acts of aggression against any of the members[43]. The New Zealand Proposal was opposed by the US, the UK and China but was supported by a substantial majority[44].

The final provision reads,

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"[45].

In San Francisco, any discussion to authorise force was postponed.

On 26 June 1945 the San Francisco Conference concluded with the signing of the Charter of the United Nations.

2.3. *And to London: the road to Nuremberg and Tokyo*

Precursors of the London Conference were the *London International Assembly*, the *International Commission for Penal Reconstruction and Development* and the *United Nations War Crimes Commission* (see Chapter 1).

While the London International Assembly was discussing the establishment of an international tribunal to try heads of states for waging aggressive war (1941 – 1944), the Allies established the *Inter-allied Information Committee* and signed the Inter-allied Declaration on the Punishment of War criminals at Saint James's Palace (also known as St James's Declaration) on 13 January 1942[46]. The Declaration recognised Germany as author of an atrocious war arising out of a policy of aggression and reaffirmed the criminal nature of aggressive wars[47]. The Chinese delegate, Mr Wunz King, in representing a country victim

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43 Summary Record of the Twelfth Meeting of Committee I/1, New Zealand Amendments (6 June 1945), in Documents of the United Nations Conference on International Organization (UN.C.I.O.), San Francisco (1945), Doc. 810, I/1/30, Vol. VI, p. 342

44 *Ibid. 342 – 344.*

45 Article 2(4), Charter of the United Nations.

46 *The Inter-Allied Declaration on Punishment for War Crimes* reprinted in *Punishment for War Crimes: The Inter-Allied Declaration Signed at St James Palace*, London 13 January 1942 and Relative documents (1942) His Majesty's Stationary Office (St. James Declaration). Ellis, M. S. (2014) Assessing the Impact of the United Nations War Crimes Commission on the Principle of Complementarity and Fair Trial Standards, (Criminal Law Forum Vol. 25, No. 1-2) Springer, Netherlands. See also The United Nations War Crimes Commission (UNWCC or the Commission) (ed.) (1948) History of the United Nations War Crimes Commission and the Development of Laws of War, His Majesty's Stationary Office, pp. 87–92.

47 Inter-Allied Information Committee (1942) Punishment for War Crimes: The Inter-allied Declaration Signed at St. James' Palace London on 13 January 1942; and Related Documents. HM Stationery Office.

of the Japanese atrocities asked to have the same conditions applied to the Japanese counterpart[48].

On 1 November 1943 the American, British and Soviet Allies signed the Moscow Declaration setting the foundations of the United Nations War Crimes Commission (UNWCC). The Commission was established on 20 October of the same year.[49] It was tasked with collecting, investigating, identifying, and advising on war crimes and responsible individuals, collecting evidence, studying the existing law and work on the establishment of an international court to try the Axis war criminals.[50] On the eastern front, an analogue apparatus to react to Japanese atrocities was also set up. At the UNWCC meetings in London, the Chinese representative requested that the same approach was endorsed also in relation to the war theatre in the Far East. On 1 December 1943 the United States, China, and the United Kingdom met at Saint James' Palace and adopted the Cairo Declaration aimed to deter, confine and punish the Japanese aggression.[51] On 10 May 1944 the Far-Eastern and Pacific Sub-commission of the UNWCC came to existence.[52]

The first official meeting of the UNWCC was held on 11 January 1944 in London, chaired by Sir Cecil Hurst (United Kingdom).[53] A series of debates focused on how to bring aggression under investigation and make it a crime.[54] The degree of cultural diversity that those meetings were bringing together entailed different approaches and conflicting views to the issue at stake. The cross-cultural situation it created added a new dimension to the discussions that complicated the process and forged some shared resentment.

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48 See Mr. Wunsz King (9 January 1942) Letter from the Chinese Minister to the Netherlands Government and Chargé d'Affaires to the Belgian and Czechoslovak Government, Chinese Legation, London, in Footnotes of the St. James Declaration.

49 Ellis, M. S. (2014), *supra note 46.* See UNWCC (1948), *supra note 46, pp.* 87–88; 89–92.

50 Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948), United Nations War Crimes Commission (UNWCC) (1943-1948), Search.archives.un.org. Available at https://search.archives.un.org/downloads/united-nations-war-crimes-commission-unwcc-1943-1948.pdf accessed on 18 January 2021. Schabas, W. (2014) The United Nations War Crimes Commission's Proposal For An International Criminal Court. In Criminal Law Forum (Vol. 25, No. 1-2) Springer Netherlands.

51 See Boister, N & Cryer, R (eds.) (2008) The Tokyo International Military Tribunal: A Reappraisal. Oxford University Press. p. 19; See The Cairo Communiqué, 1 December 1943; The Cairo Conference (22 – 23 November 1943). Cairo, Egypt

52 See UNWCC (1948), *supra note 46*, p. 129

53 Ibid. p. 119; Jackson, R. H. (1949). Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials. Department of State, 51. p. 4

54 "By far the most important issue of substantive law to be studied by the Commission and its Legal Committee was the question of whether aggressive war amounted to a criminal act." Cit. See UNWCC (1948), *supra note 46*, p. 180

For instance, a minority made of China, Australia, New Zealand, Czech Republic, Poland and Yugoslavia supported the idea of public conscience as a legitimate doctrine for determining the applicable international law, thereby pushing for a *de lege ferenda* approach. They justified the possibility of qualifying aggressive war as an international crime on the basis of such approach[55]. However, countries such as France, the United States, the United Kingdom, the Netherlands and Greece did not share the same view. They were approaching the issue from the viewpoint *de lex lata*: atrocities could be considered as international crimes. They were acts universally accepted as criminal in breach of international law and committed by individuals that were aware of the cruelness of those acts. Not the same could be said for the waging of aggressive war.[56] Agreement could not be reached at this stage and the matter was then deferred to the delegations' home departments.[57] The Commission was eventually not able to come to an agreement and the whole debate went deadlocked. No progress was made, not precedent was created. Notwithstanding, crimes against peace made became part of the international law lexicon.

In the final years of World War II a war-torn international society was filled with frustration and hatred, eager to end the atrocities and punish those who were responsible for them.

Victory at the hands of the Allies was within grasp. Four main states were strongly active in this process: United States, Soviet Union, France and the United Kingdom. They agreed to hold a conference in London in June 1945 to engage in a fast-paced negotiation process to reach an agreement on the trial of German war criminals by an international military tribunal. From 26 June to 2 August 1945 in London the International Conference on Military Trials (hereinafter the London Conference) had its doors open[58]. Premise for the establishment of an international tribunal to prosecute war criminals was the shared understanding of the concept of individual criminal responsibility for war crimes. However, at the early meetings of the International Conference in London no reference to individual responsibility was made.[59] Hans Kelsen, then advisor to the Treaty Section of the Judge Advocate Department in Washington, wrote in a memo how the concept of individual responsibility should be

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55 Ibid. p. 182 – 183.

56 "Acts committed by individuals merely for the purpose of preparing for and launching of aggressive war are *lege lata* not "war crimes"' Cit. Ibid. p. 182

57 Sellars, K. (2013) 'Crimes against Peace' and International Law (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press. p. 64

58 Letter of Transmittal. International Conference on Military Trials (1945) London

59 London Conference (1945), pp. 293 - 294

framed and understood and transmitted it to Robert Jackson, Supreme Court Judge, who was at the London Conference on behalf of the US Government.[60] Jackson supported Kelsen's point. At the end, provisions on the crimes under the jurisdiction of the tribunal "for which there shall be individual responsibility" were enshrined under draft article 6 of the Charter[61] followed by draft article 7 which rejected any claim of sovereign immunity as form of defence.[62] Within the wording of draft article 6, the major point of disagreement remained the formulation of the crime of *making war*. The United States, represented by Jackson, was the major supporter of the idea of making aggression an individual crime.

André Gros, the French representative, objected such proposal on the basis of the *ex post facto legislation* in breach of the principle of legality.[63] According to Gros, the charter of the new tribunal was to grow its roots on existing law, the principle of legality had to be fulfilled. Gross insisted that the Kellogg-Briand pact had never made any waging of a war a criminal act. There was no *opinio juris* or state practice to ground it on customary international law. Therefore, he suggested to build upon what was generally accepted[64] - that World War II involved a wide array of crimes for which individual responsibility could be triggered - as the contrary could have been perceived as an imposition. The waging of aggressive war was not recognised as a crime in itself but stemming from these premises, it could gradually be accepted.[65] France held the same view at the San Francisco Conference.[66] Gros presented a new proposal which was then supported by the Soviet Union while the United Kingdom attempted to reconcile the diverging views with a new draft. However, Jackson did not want

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60 Sellars, K. (2013), *supra note 57*, p. 86

61 Article 6, Nuremberg Charter, London Conference (1945) p. 423

62 Article 7, Nuremberg Charter, London Conference (1945) p. 423

63 "it is hard to add anything to the actual draft. The intention is the same as those of others who have proposed drafts of article 6. Our objections to the definitions so far proposed are that the statute of the International Tribunal will stand as a landmark which will be examined for many years to come, and we want to try to avoid any criticisms. We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law." See London Conference (1945) p. 295

64 London Conference p. 296. XXXVII. Minutes of Conference Session of July 19, 1945. Minutes of Conference, July 19, 1945, pp 293 – 309, Report of Robert H. Jackson, US Rep. To the International Conference on Military Trials (ICMT), London, 1945. Ferencz, B. B. (n/d) *supra note 34,* p. 383, See the whole account of the London conference (1945) in Jackson, R. H. (1949), *supra note 53.*

65 Gros, London Conference (1945) Document XXXVII, p. 296

66 "Professor Jules Basdevant had expressed scepticism about the aggression charge" cit. Sellars, K. (2013), *supra note 57*, p. 92.

to depart from draft article 6.[67] The definition of aggression was again subject of heated debates and the majority preferred to refrain from finding one.

The Russian delegate, Nikitchenko, stated:

"to enter a definition of aggression into the charter […] it would really be up to the United Nations or the security organization which has already been established to go into questions of that sort. There is an international court forming part of the U.N.'s organization [...] The task of the Tribunal is to try war criminals who have committed certain criminal acts […] to determine the measure of guilt of each particular person and to mete out the necessary punishment"[68]

The Nikitchenko wanted to attribute primary responsibility to the United Nations to find a definition of aggression. This view was also shared by France:

"if we put in an agreement on that text, it will be an anticipation of what will be adopted by the United Nations. Thus, if the new one differed from ours on this point, we would be in difficulty"[69]

On the other hand, the United Kingdom agreed with Jackson on the need to find a definition of aggression as essential feature to frame the elements of the crime, as well as the scope and the threshold of the tribunal's jurisdiction.[70] Eventually, in order to avoid the risk that the definition of aggression given by the tribunal would differ from the one the United Nations may have given, the majority withdrew from the idea of finding a definition. The Charter of the United Nations was adopted with the closing of the Conference in San Francisco on 26 June 1945, the same day of the opening of the London Conference. The Charter vested the Security Council with the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and (...) to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".[71] In case of a Council's determination of aggression, the risk of a jurisdictional conflict between the powers of the Security Council and the authority of the new military tribunal over the question of aggression caused serious

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67 London conference (1945), pp 298 – 302. See also Sellars, K. (2013), *supra note 57*, p. 93. See Document 18(g), "LII. Revised Definition of Crimes prepared by the British Delegation and Accepted by the French Delegation, July 28, 1945" and "LIII. Revised Definition of Crimes Repaired by British Delegation to Meet the Views of Soviet Delegation, July 28, 1945" in Ferencz, B. B. (n/d) *supra note 34,* p. 397

68 Nikitchenko, London Conference, p. 303

69 Gros, London Conference, p. 304

70 London Conference, p. 304

71 Article 39, United Nations Charter.

concerns to the Council's members.[72] The appointed permanent members did not want to see any of their privileges, i.e. veto powers, that their role as permanent members entail threatened. On 8 August 1945, the four big powers signed the London Agreement with the Charter of the International Military Tribunal (IMT) annexed to it. The IMT was established in Nuremberg.[73] The crimes under the tribunal's jurisdiction were listed in article 6 of the IMT Charter. Prosecutions in Nuremberg began on 20 November 1945. Twenty-one Nazi leaders appeared before the new tribunal and were tried on the charges of crimes against peace, war crimes, crimes against humanity and participation in a common plan or conspiracy to commit any of these crimes.

Article 6 limits the scope of the charges to 'major war criminals of the European Axis countries.[74] France, the Soviet Union and the United Kingdom favoured that particular selective approach to apply aggression charges for fear to be themselves subjected to scrutiny.[75] Article 6(a) provided that

"Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"[76].

Within the meaning of this paragraph, criminalizing aggression entailed three elements: that the offender engages in the waging of an aggressive war or, of a war in violation of international treaties and/or, takes part in a common plan or conspiracy. The article was thought to be comprehensive and to a certain degree tautological to satisfy the diverging views between the drafters during the negotiations. France for instance saw aggressive war as a crime while the United States paid more attention to the critics over *ex-post facto* charges in violation to the principle of legality.[77] Two weeks before the signing of the London Agreement, the United States, the United Kingdom and China issued the Potsdam Declaration defining the terms of the Japanese surrender[78]. The instrument of surrender was signed by the foreign minister to Japan, M. Shigemitsu, on behalf of the emperor and the

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72 Sellars, K. (2013), *supra note 57*, p. 100

73 Sayapin, S. (2017). The Crime of Aggression in International Criminal Law. T.M.C. Asser Press, The Hague. p. 40

74 Article 6, London Charter.

75 London Conference (1945) pp. 330 – 340 and 387. See also Sellars, K. (2013), *supra note 57*, p. 102

76 Article 6, London Charter.

77 See Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 119

78 See Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 199

Japanese government. In the Pacific, support for a trial on the Japanese war of aggression was significant and not controversial as it was in Europe.

On 19 January 1946, General Douglas MacArthur Supreme Commander of the Allied Powers issued a Special Proclamation that announced the establishment of the International Military Tribunal for the Far East (IMTFE). The IMTFE was set up to try "those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace"[79]. With the end of World War II, officially on 2 September 1945, maintenance of world peace and security relied on two pillars: the United Nations, outcome of the San Francisco Conference responsible for upholding peace between states, and the two *ad hoc* military tribunals in Nuremberg and Tokyo bound to the prosecution of individual crimes. As Benjamin Ferencz noted, it was probably not a coincidence that the proposal to include the launching of an aggressive war as crime in the jurisdiction *ratione materiae* of the IMT was presented at the London conference on the same day that the Charter of the United Nations at the San Francisco Conference was outlawing the use of force[80]

3. **Crimes against peace at Nuremberg and Tokyo**

3.1. *The codified crimes*

The recognition of individual criminal liability for crimes against peace arrived only with the establishment of the first international military tribunal. Prosecutions of those charges relied on three major sources: the Charter of the International Military Tribunal[81] annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (the Nuremberg or IMT Charter), the Charter of the International Military Tribunal for the Far East (hereinafter the Tokyo Charter)[82] and Control Council Law No. 10

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79 Article 1, Special Proclamation by the Supreme Commander for the Allied Powers (19 January 1946) Tokyo, in Trials for the Far East.

80 See Ferencz, B. B. (n/d) *supra note 34,* p. 492. Schabas, W. A. (2017). Origins of the Criminalization of Aggression: how crimes against peace became the "supreme international crime". In The International Criminal Court and the Crime of Aggression. Routledge. p. 21 – 28. Trainin, A. N., In Vyshinsky, A. Y., & Rothstein, A. (1945). Hitlerite responsibility under criminal law. London: Hutchinson & Co., Ltd. p 11.

81 London Charter.

82 The IMTFE was established by the Proclamation of General MacArthur on 19 January 1946 in accordance with the provisions of the Potsdam Declaration for which "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners". See Charter of the International

on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity[83].Thanks to the unique post-war context, the prosecution of crimes against peace was internationally accepted and supported.

Article 5 of the Tokyo Charter was modelled on Article 6 of the Nuremberg Charter. Article 6(a) of the IMT is indeed nearly identical to article 5(a) of the IMTFE. It reads:

"Crimes against peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"[84].

The different backgrounds in which atrocities took place between Europe and the Far East, and the different reasons and means by which aggression was waged required some distinctive parameters to allow for prosecution. Each adjustment had a precise purpose. *Declared or undeclared* meant to prevent the possibility that charges of aggression could be dropped on the ground of "an incident", such as the Mukden Incident, ploy for the Japanese invasion of Manchuria (North-eastern China), or in the case of Pearl Harbor, that took place without any formal declaration of war on the side of Japan. Therefore, to declare a war, even if aggressive, would have not waived such a war of its criminal character. The term *law* was useful to counter-argue criticism about retroactivity and illegality. The Tokyo tribunal, in re-applying the law of Nuremberg, sought to strengthen the legitimacy of the charges implemented in the European arena[85].

With the end of the war, Law No. 10 of the Allied Control Council was adopted to support the exercise of jurisdiction over crimes against peace by persons "other than those dealt with by the International Military Tribunal"[86]. Article II (1)(A) reads:

"Crimes against peace: Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,

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Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo (19 January 1946). Treaties and Other International Acts Series 1589 (International Law Studies vol. 45) International Law Documents. Most of what Nuremberg entailed applied *mutatis mutandis t*o the IMTFE. United Nations International Law Commission. (1997). Yearbook of the International Law Commission 1994, Vol. II, Part 2. United Nations. p. 41

83 Control Council for Germany Law No. 10 (20 December 1945). Official Gazette of the Control Council for Germany, No. 3. (International Law Studies vol. 45). International Law Documents. p. 12

84 Article 5(a), Charter of the IMTFE (1945).

85 See Sellars, K. (2013), *supra note 57*, p. 184 – 185.

86 Control Council Law No. 10 was the law under which the jurisdiction of the United States' Nuremberg tribunals was established to prosecute the Nazi war criminals that did not face prosecution in Nuremberg before the IMT.

agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"[87]

The wording of Control Council Law No. 10 for crimes against peace does not replicate those of articles 6(a) and 5(a) of the Nuremberg and Tokyo IMTs.

3.2. *State conduct element at an impasse*

A major weakness of the Tokyo and Nuremberg trials was the absence of a definition of war of aggression as state act element of the crime.[88] Crimes against peace, as for the crime of aggression today, entail dual responsibility: the responsibility of the state and that of the individual. Therefore, to establish criminal liability the proceedings in Nuremberg and Tokyo were compelled to consider it comprising two different elements, the state act element and the individual conduct element.

The state act element of the crime therefore is the wrongful conduct of the state upon which responsibility can be triggered. For crimes against peace, the state act element comprises the waging of aggressive war. Differently from the other atrocity crimes the conduct of the state is by definition part of aggression charges. Therefore, first the state conduct had to be recognised as wrongful under existing international law, and only then the individual conduct could be deemed to give rise to criminal liability. Accordingly, the determination of a war of aggression as state act element becomes essential to establish individual criminal liability for crimes against peace. The absence of a precise definition had the effect of leaving to the judges at Nuremberg and Tokyo the task to determine what constituted a war of aggression

87 Article II(1)(a), Control Council Law No. 10, *supra note 83*.

88 McDougall, C., The Crimes Against Peace Precedent in Barriga, S. andKreß, C. (eds), The Crime of Aggression: A Commentary (2017) vol. 1 p. 53. Jackson claimed already at that time that the failure of the charter to define a war of aggression was one of the Charter's inherent weaknesses. See Opening Statement before the International Military Tribunal (21 November 1945) by Robert H. Jackson in Second Day, Wednesday 21 November 1945, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings 14 November 1945- 30 November 1945 [Official Text in English Language] IMT Nuremberg, 1947.

and the constitutive elements of the crime.[89] "[A] judge does not need a definition"[90], said judge Röling in Tokyo. The concept of aggression did not have much ground in international practice nor had it a generally accepted meaning. As elaborated by McDougall, the tribunals demonstrated that the state act element of the crime had to include a war with the object of the occupation or conquest of another territory, or in support of a war of aggression by another party or aiming at disabling the capacity of another state to provide assistance to those States victims of aggression.[91] For what concerns the concept of war, the negative definition of war was largely accepted: a war waged in self-defence was not a war of aggression[92]. The elements of *intent* - to expand over China - and *purpose* - Japanese expansionist sentiment - became part of the definition of war only at the IMTFE.[93] Therefore, to determine the wrongful conduct of the state, judges in Nuremberg invoked existing sources of authorities such as the Charter of the Tribunal or the Kellogg-Briand Pact; and to attribute individual responsibility for the waging of a war of aggression they relied primarily on factual evidence.[94] In the Far East instead, the prosecution tried to identify concepts that could help define the scope and definition of aggression in the existing literature and other substantive sources. However, the defence was very good in using evidence to dismiss any of their attempt[95]. The Far Eastern Tribunal at last also dropped the idea of defining aggression.

3.3. *at the Far Eastern stage*

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89 see Xue, R. (2016) Crimes against peace at the Tokyo trial. in Liu, D.; Zhang, B. (eds) (2016) Historical war crimes trials in Asia (FICHL Publication Series No. 27) p. 4. See also Strapatsas, N. (2011) Aggression, in Schabas, W. A. and Bernaz, N. (eds.) (2011), Routledge Handbook of International Criminal Law (Routledge) London pp. 156–57.

90 See Röling, B. (1955). On aggression, on international criminal law, on international criminal jurisdiction, I. Nederlands Tijdschrift Voor Internationaal Recht, 2(2), p. 169; see also Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 169.

91 McDougall, C. (2013). The crime of aggression under the Rome Statute of the International Criminal Court. Cambridge University Press. p. 3

92 McDougall, C. (2017), *supra note 88*, p. 70

93 For further information see McDougall, C. (2017), *supra note 88*, pp. 53 - 70

94 The Tribunal in Nuremberg referred to Ečer's arguments according to which as far as war crimes were punishable under the Hague Convention, crimes against peace should have been punishable under the Kellogg-Briand pact. See International Military Tribunal Nuremberg (1947) Official Documents Vol. 1, Nuremberg Germany, pp. 218 – 221; see also Sellars, K. (2013), *supra note 57*, p. 167.

95 See Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 122

In Tokyo the tribunal was set up by virtue of the Cairo declaration by the US, China, the UK, Australia, Canada, France, the USSR, the Netherlands, New Zealand, India and the Commonwealth of the Philippines. The law of the IMTFE Charter was regarded as binding [96] and any submission that could challenge the jurisdiction of the Tribunal was dismissed based on the binding nature of the Charter and on the ground that the Nuremberg Judgement had already been successfully delivered.[97] The fact that the proceedings in Nuremberg ended long before those in Tokyo, eased the far eastern bench and prosecution team in the delivery of their functions. Tokyo duplicated the answers that were given in Nuremberg when questions of breaching the principle of legality were raised, and referred often to Nuremberg as by then a new precedent in the application of the law[98].

The situation was eased at the IMTFE also thanks to the UN General Assembly (GA) Resolution 95(1) issued in December 1946 that enshrined the Nuremberg Principles. The Nuremberg Principles were codified soon after the delivery of the judgement in Nuremberg, almost two years before the Tokyo Tribunal delivered its own. This allowed the bench in Tokyo to rely also on those written principles to support its counter-arguments on the legal validity of crimes against peace. The Cairo Declarations, the Potsdam Declaration and the Instrument of Surrender were also key sources of authority. From the former to the latter these legislative instruments stressed respectively that '*aggression of Japan was to be punished*, "*stern justice shall be meted out*" and *Japan's signing of the instrument of surrender meant the acceptance of the allied declarations'* that led to the establishment of the tribunal and aggression to become a crime[99]. Some of the judges in Tokyo turned to natural law when looking at the origins of the crime. Others relied on the fact that accepting appointment to the Tribunal meant to automatically accept the validity of the Charter and therefore the criminalization of crimes against peace amounting to individual criminal responsibility[100]. The proceedings in Tokyo took a broader and more in-depth scope. While

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96 Boister, N., & Cryer, R. (Eds.). (2008). Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments (Vol. 1). Oxford University Press. p. 79

97 Ibid. p. 80 – 81 For extensive reasoning see Majority Judgment of the Tokyo International Military Tribunal, paras 48436 – 48441..

98 Liu, D.; Zhang, B. (eds) (2016) Historical war crimes trials in Asia (FICHL Publication Series No. 27) Torkel Opsahl Academic Epublisher, Brussels. pp. 8 – 9; See also Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p.121

99 Instrument of Surrender (2 September 1945), Series Instruments of Japanese Surrender, 2 September 1945, available at https://catalog.archives.gov/id/1752336 accessed on 15 December 2021.

100 Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 131

in Nuremberg the accused were charged on four counts[101], two of which were on crimes against peace (counts one and two), Japanese officials were prosecuted under fifty-five counts divided into class A, B and C according to the degree of responsibility for aggressive war or crimes against peace. Under Class A charges, there were thirty-six counts on crimes against peace for the illegal waging of a war at the hands of Japan and individual involvement in such a conduct for those with a degree of sufficient authority, either military or political, to bring Japan in an aggressive war of conquest and domination[102]. Count one to five charged conspiracy for waging wars of aggression and for the axis powers to assist each other in aggressive warfare. Counts six to seventeen charged all the accused but one for planning and preparing aggressive war. Counts eighteen to twenty-six charged all the accused for initiating aggressive war and counts twenty-six to thirty-six for waging aggressive wars[103]. The Tribunal understood conspiracy for the waging of aggressive or unlawful war to arise when two or more persons enter into an agreement to commit that crime. This meant that planning and preparing are already established within the meaning of conspiracy. Because all the accused were charged with conspiracy, the tribunal did not convict any defendant on planning and preparation charges. No conviction upon counts 6 to 17 was necessary. Same approach was taken with the counts in relation to initiation and waging of aggressive wars. Initiating in the sense of commencing hostilities entails the actual waging of aggressive war, which gives no reasons for conviction on both categories of counts. No convictions on counts 18 to 26 were carried out[104]. In the IMTFE judgement, delivered on 1 November 1948, eight of the accused were found guilty of conspiracy to commit crimes against peace and twelve were found guilty of committing crimes against peace. This outcome, despite being fertile ground for debate, was pivotal to prove that aggression and conspiracy to aggression were crimes rising to individual criminal responsibility.

3.4. *The elements of the crime*

[101] See International Military Tribunals (Nuremberg), Judgment (1 October 1946)
[102] Liu, D.; Zhang, B. (eds) (2016) *supra note 98*, p. 6. See Article 5 Potsdam Declaration (26 July 1945)
[103] Judgment of the International Military Tribunal for the Far East (4 November 1948) Tokyo, available at https://www.loc.gov/rr/frd/Military_Law/pdf/Judgment-IMTFE-Vol-I-PartA.pdf accessed on 15 December 2021.
[104] International Military Tribunal for the Far East (1948) Majority judgment. Indictment, para. 48.499.

The London and the Tokyo Charters were silent on the elements of the crime, on individual conduct and *mens rea*. The only mode of liability used was that of conspiracy. The *actus reus* of crimes against peace was: planning, preparing, initiating and waging aggressive war[105]. Personal knowledge was the required mental element[106]. Intent and purpose until initiation of the war characterized the war of its aggressive nature. The focus was then mostly on the conduct of the accused until the beginning of the war. Therefore, conviction was often secured on any element of planning, preparing, initiating, and waging of the war[107] and on significant contribution for the advancement of such a plan[108]. In all the charges, wars were considered all aggressive wars, and leaders and policy makers could be held liable for it[109].

3.4.1. Individual criminal liability: who were to be held liable?

Individual criminal responsibility for crimes against peace applied primarily to the leadership class of perpetrators. Nuremberg charged twenty-two defendants as leaders, organisers, instigators or accomplices in the formulation and execution of the common plan to commit crimes against peace, and to participate in the planning, preparation, initiation, and waging of wars of aggression.[110] Aggression was not born as a leadership crime, it was a knowledge crime. As in the U.G. Farben case[111], knowledge and participation were the essential criteria to trigger individual responsibility for crimes against peace[112]. It began to be identified as leadership crime only later by the tribunal in the High Command judgment. In this case the military tribunal held that only those individuals that sit at the *policy level*

105 McDougall, C. (2017), *supra note 88*, p. p. 85

106 McDougall, C. (2017), *supra note 88*, pp. 87, 100. See also Brownlie, I. (1961). International law and the use of force by states (Doctoral dissertation, University of Oxford). pp. 196 -200. See also Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 140

107 McDougall, C. (2017), *supra note 88*, pp. 85 – 87 and 96 - 100

108 Ibid. 82 – 85.

109 Boister, N & Cryer, R (eds.) (2008), *supra note* 51, p. 143.

110 Count 1, Indictment, International Military Tribunal, Nuremberg Trial Proceedings, Official Documents vol. 1, p. 29. available at Nuremberg Trial Proceedings Vol. 1. Indictment: Count One.

111 United States of America v. Carl Krauch et al. (the I G. Farben Case) (1948), Historical Review of Development to Aggression (2003) United Nations, New York. paras 131 – 134. See also ibid. paras. 58-65, 96-97, 128-142.

112 Ibid. paras 149 – 165. More specifically see ibid. paras 158 – 162. See also Heller, K. J. (2007) Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression European Journal of International Law, Volume 18, Issue 3, p. 486

could be able to commit the crime of aggression[113]. The *policy level* could be assessed by the individual's ability to *shape or influence the policy* of the state.[114] For individual criminal liability for crimes of aggression to rise the alleged perpetrator has to have knowledge that *aggressive war is intended and that if launched it will be an aggressive war*, has to be able *to shape or influence the policy that brings about its initiation or its continuance after initiation* and acts in furtherance of that policy[115]. These three elements introduced the first standard of the *leadership clause*.[116] There is not a set standard requirement in relation to a person's rank or status that has to be met, but the power to shape or influence the policy that the individual holds so to establish liability under the charges of crimes against peace[117].

Accordingly, crimes against peace could be criminalized only if committed by individuals at the policy or leadership level. A person in a leadership position cannot plead ignorance when a war of aggression is waged, nor can he or she plead ignorance of existing international law that prohibits and/or regulates it.[118] The element of knowledge becomes integral part of the leadership element. Vice versa, a leadership crime entails the element of knowledge. This was also the position held in Nuremberg in the prosecution's arguments in support of the principle of legality. Major architects of both the notions of individual criminal liability and of the leadership clause were the Soviet jurists Aron Trainin and E. A. Korovin.[119]

In the IMT judgement is clarified that,

'"Nullum crimen sine lege" is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances [...is] untrue, for in such circumstances the attacker must know that he is doing wrong. [...] Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all International Law when in complete deliberation they carried out their designs of invasion and aggression'.[120]

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113 See Judgment, *The High Command Case,* in United States v. von Leeb et al., Military Tribunal XII, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Volume XI, Washington (1950). at 488-491

114 Ibid.

115 Judgement, High Command Judgement, *supra note 113,* p. 488.

116 For an extensive analysis on the leadership requirement in relation to the crime of aggression, see Heller, K. J. (2007). *supra note 112.*

117 Ibid. at 488

118 Brownlie, I. (1961), *supra note 106,* p. 197 – 198.

119 Brownlie, I. (1961). *supra note 106,* p. 161.

120 1946 Nuremberg Judgment (excerpts). (2011). In S. Barriga & C. Kreß (Eds.), The Travaux Préparatoires of the Crime of Aggression (pp. 135-140). Cambridge: Cambridge University Press. p. 136

In Tokyo things were slightly different. Japan's plan for waging an aggressive war reflected *"not the work of one man, but the work of many leaders acting in pursuance of a common plan for the achievement of a common object".*[121] It was difficult in Tokyo to identify a core group of perpetrators. Japan saw a series of changes in the cabinets in those years and political instability was at its pick. However, the Tribunal in Tokyo adopted the shape and influence criteria that considered a high-ranking position to influence and shape state policy towards aggression. This meant that there was a wide range of defendants to be alleged responsible in making effective contribution to Japan's war and the IMTFE findings were less coherent and more controversial[122]. The IMTFE concluded that conspiracy to wage a war of aggression was to be considered the gravest of the crimes given the degree of threat to people's security it involved. It was not even necessary to understand if it was in violation of treaties[123].

3.5. *Concurring and dissenting opinions in Tokyo*

Major subjects of dissent were that of making aggression a crime and the attribution of criminal liability to individuals. Two schools of dissent stemmed from it. One side aligned those in defence of the principle of sovereignty who believed that holding leaders personally accountable for crimes of aggression was premature and counterproductive for a lasting international *status quo.* The other side comprised those who supported the principle of just war and anti-colonial struggle rejecting the idea of the criminalization of aggression because of the limits it could create to the fight for anti-colonial feelings. On this basis, a series of separate opinions were presented in Tokyo. President Webb and Judge Jaranilla submitted a concurring opinion seeking to shed some light on the issue[124], while three of the judges submitted their dissenting opinion. The dissenting opinions born out of the Tokyo trial played a relevant role in the legacy of the tribunal and in the history of the crime of aggression, allowing it not to be dismissed as legal anomaly but to endure over time.

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121 Cit. Judgment, International Military Tribunal for the Far East, (November 1048) Part C, Chapter IX, Findings on Counts of the Indictment. pp. 1141 – 1142.

122 Xue, R. (2016) Crimes against peace at the Tokyo trial. in Liu, D.; Zhang, B. (eds) (2016), *supra note 98,* p. 7

123 Majority Judgment, in Boister, N., & Cryer, R. (Eds.). (2008), *supra note 96* at para. 49769.

124 U.S.A. and others. V. Araki and others. Separate Opinion of the President (1 November 2008). in Boister, N., & Cryer, R. (Eds.). (2008), *supra note 96,* p. 631

The most detailed and strong critique came from the Indian Judge, Radhabinod Pal, who rejected the authority of the tribunal *in toto.*[125] He criticised the premature criminalization of war in a system where alternatives did not yet exist, nor it existed an international community able to effectively guide the resolution of international disputes. Pal was strong in its critique towards the Western nations. Domination and colonialism were western practices and war was the only instrument the dominated nations held to fight the struggle against colonialism and imperialism. Taking war away would have *paralysed* international relations[126]. Priorities in international relations were to be reordered, and justice should have had priority over peace while in that moment the premise to the creation of crimes against peace was the opposite, peace taking precedence over justice. Pal asked to depart from a focus on war and peace to embrace the justice cause based on natural law[127]. Different was the stand that the French Judge Bernard took in his dissenting opinion. He had no doubt that aggressive war was "a crime in the eyes of reason and universal conscience"[128] being it the expression of natural law.[129] He agreed with the charges but, he argued that the tribunal was not impartial nor could guarantee a *fair judgement*. This was in breach of the dictates of natural law upon which the criminalization of aggression could be built. According to natural law, any legal person who can decide to adjudicate a case has to be fair, impartial and without bias. The partiality of the prosecutions in Nuremberg and Tokyo was in breach of those rules. Defendants did not know they were acting in a criminal manner, nor formal evidence existed for the existence of a plot that would raise to conspiracy charges. Vagueness and procedural defects added to Bernard dissension on the majority judgement.[130] A third famous dissenting opinion was that of judge Röling of the Netherlands, who saw aggressive war subject to moral condemnation but not a crime before the beginning of the war. Therefore, it was not to be considered as such.

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125 See Judgment of the Hon'ble Mr. Justice Pal Member from India. Part VII, Recommendation, in Boister, N., & Cryer, R. (Eds.). (2008), supra note 96. p. 1426. Sellars, K. Crimes against Peace' and International Law, in Kress, C., & Barriga, S. (Eds.). (2016). The crime of aggression: A commentary. Cambridge University Press. p. 115

126 See Sellars, K (2016), *supra note 125*, pp. 113-114

127 See Judgment of the Hon'ble Mr. Justice Pal Member from India, *supra note 123.*

128 IMTFE, Bernard Dissent, vol. CV, 10 as cited in Sellars, K. (2016). The legacy of the Tokyo dissents on 'crimes against peace'. Sellars, K. (2016) The Legacy of the Tokyo Dissents on 'Crimes against Peace' in Claus Kress and Stefan Barriga (eds), The Crime of Aggression–A Commentary (Cambridge University Press, 2016), p. 116, footnote 18.

129 Ibid. p. 116

130 See Dissenting Opinion of the Member from France, in Boister, N., & Cryer, R. (Eds.). (2008), *supra note 96.* pp. 664 - 676

Röling, despite similar to Pal in dissenting over the charges of crimes against peace, gave the European perspective on the issue. Taking a positivist stand, he agreed on the illegality of the charges in terms of retroactivity and of being "premature" for an international community that was not there yet. It would have become meaningful only when the whole international community would submit to the pacific settlement of disputes[131]. Justice was not to be used to eliminate those who endangered peace[132].

3.6. *Application of crimes against peace in national jurisdiction*

Several states accepted as legal the criminality of certain acts born out of the two world wars and identified with the establishment of the new system of collective security and the two *ad hoc* tribunals. Many of them incorporated article 6(a) and 5(a) of the IMT and IMTFE Charters in their domestic law.[133] China presents a good example in this case. The Chinese government issued a law on 26 October 1946 to try war criminals, namely the *Chinese Law Governing the Trial of War Criminals*. Article I of the Chinese new law asserted that the sources of the law to be applied were the present *Law*, international law and the Chinese penal code.[134] Article II provided:

"A person who commits an offence which falls under any one of the following categories shall be considered a war criminal:
1. Alien combatants or non-combatants who, prior to or during the war, violate an International Treaty, International Convention or International Guarantee by planning, conspiring for, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war."[135]

The War Crimes Military Tribunal of the Ministry of National Defence was a domestic military tribunal established in Nanjing to try war criminals. Japanese General Takashi Sakai was tried there by Chinese authorities on the charges of crimes against peace. Sakai served as military commander in China from 1939 to 1945 and during the hostilities following the Mukden incident in 1931. He was charged of crime against peace to participate in the waging of the war against China during his time as military commander. The tribunal found that

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131 Opinion of Mr. Justice Röling (12 November 1948). pp. 22 – 35
132 See Sellars, K. (2016), *supra note 125*, p. 115
133 See Brownlie, I. (1961). *supra note 106,* pp. 175 - 181
134 See Annex, Chinese Law Concerning Trials of War Criminals, in United Nations War Crimes Commission (1949) Law Reports of Trials of War Criminals, Vol. XIV. p. 152.
135 Ibid. at III, p. 152 - 153

Takashi Sakai was one of the leaders influential in the progress of Japan's war of aggression.[136] Sakai had violated the Kellogg-Briand Pact and the Nine-Power Treaty that demanded "*to respect the sovereignty, independence, territorial and administrative integrity of China"*[137] and prohibited war in *violation of international treaties*. Sakai was the first Japanese accused to be convicted and executed of crimes against peace and his conviction and execution pre-dated the decisions of both the Nuremberg and Tokyo tribunals[138]. The trial of Takashi Sakai concluded on 27 August 1946 and the verdict in Nuremberg did not come until 1 October 1946. The IMTFE began its proceedings on 19 April 1946 and concluded in November 1948. Most of the materials were available to the Chinese judges, but not their judgements. Control Council Law No. 10 was also used in support of the Chinese authorities in their domestic trials.

This journey onto the efforts of the military tribunals in Nuremberg and Tokyo, makes clear that the post war years represent a crucial phase of the creation of the crime of aggression. It was the first time that individual criminal liability was effectively taken to court and was the first time that state leaders and policy-makers were indicted for cooperating and engaging in conspiracy. The whole state apparatus was under scrutiny.
Future progresses in the codification of the crime of aggression stemmed from these two tribunals and shaped through the works of various legal and political bodies within the United Nations system.

4. **Aggression at the interplay of judicial and political entities**

4.1. *Roadmap to the Definition of Aggression*

Shortly after the establishment of the United Nations, which carried with it the prohibition of the use of force as provided in Art 2(4), the proceedings in Nuremberg and Tokyo delineated the roots of the new body of international criminal law.

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136 Brownlie, I. (1961). *supra note 106,* pp. 181

137 See Clark, R. (2013). The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampala Review Conference on the ICC in 2010. in Heller, K., & Simpson, G. (Eds.), The Hidden Histories of War Crimes Trials. Oxford University Press, pp. 393- 395

138 More on this case will be discussed in Chapter 3. See ibid. p. 390, footnote 15.

Right after the delivery of the judgment in Nuremberg, on 11 December 1946 the General Assembly Resolution 95(1) affirmed the recognition of its ground-breaking principles[139]. On 21 November 1947 General Assembly Resolution 177(II)[140] directed the International Law Commission (ILC) to formulate those principles as recognized in the London Charter and in the Nuremberg judgment so to develop new principles of customary international law and to prepare a Code of Offences Against the Peace and Security of Mankind.[141] In 1950, the ILC endorsed a text containing seven international law principles recognized as Nuremberg principles[142]. Endorsing the London Charter, Principle VI(a) makes crimes against peace punishable under international law. Yet, also in this case no definition of aggression was found and no consensus was reached over it. In the same years, the beginning of the cold war, and the east-west political conflict it engendered, froze the advancing of all the codification efforts. The newly born system of collective security had collapsed. After the blowing of the Korean War in 1953, tensions heated further and fear of the third world war grew. The major powers were afraid that finding a definition of aggression, that was already challenging *per se*, could have been counterproductive and result in many detrimental loopholes. In such a hectic reality that was swallowed in power-politics, the General Assembly decided to postpone any further consideration over the draft code until a proper definition of aggression was reached.[143] It took 22 years for a non-binding resolution containing a definition of aggression to be adopted.

In 1951 the ILC completed a Draft Code of Offences Against the Peace and Security of Mankind and presented it to the General Assembly. This was the moment when transformation from crimes against peace to the crime of aggression began. Article 2 of the draft code contained a list of crimes outlined on the same wording as of crimes against

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139 Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, Resolution 95(1), General Assembly New York (11 December 1946)

140 Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, Resolution 177(II), General Assembly (21 November 1947)

141 Summaries of the Work of the International Law Commission. Formulation of the Nürnberg Principles, (International Law Commission) (2015) available at https://legal.un.org/ilc/summaries/7_1.shtml accessed on 6 September 2021. Text of the Nürnberg Principles, adopted by the International Law Commission, A/CN.4/L.2. Extract from the Yearbook of the International Law Commission. Document 950 Vol II.

142 For further details on the Nuremberg Principles, please see Cassese, A. (2004). Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. The Laws of Armed Conflicts.

143 Bruha, T. (2016). The General Assembly's Definition of the Act of Aggression. In C. Kreß & S. Barriga (Eds.), The Crime of Aggression: A Commentary (pp. 142-177). Cambridge: Cambridge University Press, p. 148

peace[144]. The proposed draft definition was rejected. Debates raised over the desire and feasibility of reaching a generally agreed definition of aggression. The General Assembly therefore established a Special Committee to work on the notion of aggression, to draft a definition and study its role within the existing international law framework. GA Resolution 688 (VII) of 20 December 1952 set up the Special Committee to discuss questions over defining aggression,[145] over the draft Code of Offences against the Peace and Security of Mankind and international criminal jurisdiction[146]. Despite far from being fully-fledged, in April 1954, the ILC presented its report on the draft code of crimes containing a provision on aggression.[147] It needed a total of four special committees[148] entrusted with the task of submitting a draft definition of aggression and studying member states views on it, before some significant progress could be made. In the midst of the cold war, while armed conflicts were taking ground again[149], questions of peace and security took over the discussions on the need of a definition of aggression. Some were of the view that a definition of aggression was necessary to respond to threats to peace, while others opposed this view[150]. On 18 December 1967, GA Resolution 2330 (XXII) established the fourth Special Committee of thirty-five members to "expedite the drafting of [the] definition of aggression". A series of draft proposals came from various states. As noted by Bruha[151], despite the standstill situation that endured for almost twenty years, the turning point in this endless effort for defining aggression seemed to be linked to structural changes within the UN that came along with the *quasi*-completion of the decolonization process. The global South covered a good majority of the General Assembly, and by way of majority votes they could push the agenda

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144 Report of the International Law Commission on its Third Session, (16 May to 27 July 1951), Official Records of the General Assembly, 6th Session, Supplement No. 9 (A/1858) Yearbook of the International Law Commission 1951, vol. II, pp. 135–136. See also McDougall, C. (2013). *supra note 91.* p. 4

145 Question of defining aggression, (20 December 1952), Resolution 688, Sixth Committee, General Assembly, A/RES/688 (VII).

146 Ibid.

147 Report of the International Law Commission on the Work of its Sixth Session (1954) in 1954 Yearbook of the International Law Commission Vol II, A/CN.4/SER.A/1954/Add.1. p. 151

148 The second and the third committees were established by GA Resolution 895 (IX) (4 December 1954) and GA Resolution 1181 (XII) (29 November 1957). The fourth committee established by GA Resolution 2330 (XXII) (18 December 1967).

149 See for instance the Korean war, the Suez crisis, the Cuban missile crisis, the Congo crisis, the Vietnam war, the Soviet invasion of Hungary and Czechoslovakia

150 Ferencz, B. B. (n/d) *supra note 34,* Vol. 2, Part III; Bruha, T. (2016). *supra note 143,* p. 149. See Report of the Special Committee on the Question of Defining Aggression, 23rd Session, Agenda Item 86, A/7185/Rev. 1 (1968), pp. 3-8A

151 Bruha, T. (2016). *supra note 143,* p. 150. See also, Bruha, T. (1980) Die Definition Aggression. Faktizität und Normativität des UN- Konsensbildungsprozesses der Jahre 1968 bis 1974, Schriften zum Völkerrecht (SVR), Vol. 66, Zugleich Ein Beitrag Zur. Duncker & Humblot

on interests of concern. Being it in the aftermath of the colonial frustration and in the midst of the fight against apartheid they wanted to foster the development of international law next to the political agenda of those years so that, by way of consensus, the General Assembly could withdraw its efforts. In 1970 the Special Committee submitted the report on the Principles of International Law Concerning Friendly Relations and Co-operation among States, adopted by consensus by the GA as the Friendly Relations Declaration, Resolution 2625 (XXV).[152] The adoption of the Declaration set a new scene to accelerate the drafting process pushed by the new premise that defining aggression was necessary for the maintenance of international peace.[153] A progressive bit-by-bit process brought a wide array of diverse positions conveying towards the achievement of a consolidated draft definition of aggression. Once the consolidated text was presented and slightly amended, it was approved by consensus by the Special Committee and submitted to the General Assembly. On 14 December 1974, after a long journey of protracted negotiations, the General Assembly approved the draft definition of aggression in Resolution 3314.

In this long process towards 1974, the Soviets were very active[154], differently from their attitude in San Francisco and London. The exit-entry shifts of the Soviet Union from the Security Council, their veto in relation to the Korean war and, the United States' attempt to bypass the veto through the Uniting for Peace resolution triggered the Soviets to push for the determination of a definition of aggression. In almost all the debates that took place between 1952 and 1974 the Soviets led the definitional mission.

4.2. *Resolution 3314. The annexed Definition of Aggression*

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[152] Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations (24 October 1970) General Assembly Resolution 2625 (XXXV).

[153] Need to expedite the drafting of a definition of aggression in the light of the present international situation, GA Resolution 2330 (XXII) (18 December1968), General Assembly 22nd Session 1967-1968. 1638th Plenary Meeting.

[154] See Duties of States in the event of the Outbreak of Hostilities (17 November 1950), General Assembly Resolution 378 (V), A/RES/378 (V). Report of the International Law Commission on the Work of its Sixth Session (1954) Yearbook of the International Law Commission Vol II A/CN.4/SER.A/1954/Add.1. Draft Resolution submitted to the First Committee by the Union of Soviet Socialist Republics (6 November 1950) Official Records of the General Assembly, 5th Session, Annexes, A/C.1/608. Question of defining aggression (31 January 1952) General Assembly Resolution 599, A/RES/599. Soviet Draft Definition, Ferencz, B. B. (n/d) *supra note 34,* Vol. 2, 329-331. Letter of the USSR Foreign Minister Gromyko (22 September 1967) Ferencz, B. B. (n/d) *supra note 34,* Vol. 2, at 272; Bruha, T. (2016). *supra note 143,* p. 150; Sellars, K. (2016), *supra note 125*, p.118. .

The definition of aggression was simply annexed to the resolution. The decision not to incorporate the definition within the text of the resolution, which is common practice in the General Assembly resolutions of this kind, most likely reflected the complex nature of the drafting process to achieve a consensus of competing and often opposing views.

The decision of annexing the consolidated text seemed to reflect the GA stand, which was that of *approving*[155] it so to function as *guidance*[156] for the Security Council in the determination of aggression. The GA, *strategically*, did not declare that those acts in fact constitute aggression. Resolution 3314 highlighted in its wording that the fundamental purposes of the United Nations were the maintenance of international peace and security, that nothing should affect the scope and provision of the UN Charter,[157] and that the definition of aggression had to contribute to the maintenance of peace and security as its sole final purpose[158]. Being it drafted as political guidance for the Security Council, it was rather clear that the Definition was a composite mix of political and legal compromises over diverging opinions. The Definition uses the same terminology of the UN Charter such as the *use of force* or act of aggression, the use of the word *war* is weaker. The mental element seemed to be at discretion and no hint at a specific circumstance under which it could be considered as lawful was given. Its structure comprises a broad introductory definition of aggression modelled on Article 2(4) of the UN Charter leaving out the concept of "threats" and followed by the enumeration of acts qualifying as acts of aggression[159]. Carrie McDougall identifies it as a chapeau definition. Also, drawing from Article 2(4), the definition adds the terms *armed* in *use of force* and *sovereignty.* Among a few others changes, these inclusions reflected mainly the contextual setting in which the definition developed: between the completion of the decolonization process and the atmosphere of easing tensions and increased focus on trade and economic cooperation resulting from the policy of détente[160]. The explanatory note to Article 1 of the Definition was a strong innovation and

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155 Definition of Aggression, annexed to the General Assembly Resolution 3314 (XXIX) (14 December 1974), operative para. 1 "*Approves* the definition of Aggression..."

156 Ibid. operative para. 3 "Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommend that it should, as appropriate, take account of that Definition as *guidance* in determining, in accordance with the Charter, the existence of an act of aggression".

157 Ibid. preambular paragraphs 1 to 4.

158 See Ibid, both operative and preambular paragraphs

159 Artt 1- 3, Ibid,

160 Revelations from the Russian Archives, the Soviet Union and the United States in Internal Working of the Soviet System. Available at https://www.loc.gov/exhibits/archives/sovi.html accessed on 20 December 2021.

served to indicate to which political entities the definition should have applied[161]. In Article 2 of the definition, *prima facie* evidence that an act of aggression has occurred is established only by armed force; aggressive intent is not provided explicitly. Article 4 confers the Security Council wide discretion in determining acts constituting aggression. It grants the Council the power to establish the existence of an act of aggression beyond *prima facie* evidence and the acts listed in article 3[162]. The final decision lies still with the Security Council. Article 5 recalls the wording of Nuremberg and of the 1970 Friendly Relations Declaration[163] despite it does not talk about acts of aggression. It was difficult to find consensus over acts of aggression giving rise to criminal responsibility.

The Security Council referred to acts of aggression thirty-two times between 1974 and 1990 and no reference to 3314 GA resolution was made. Since 1990, no further reference by the Council was made[164]. The GA referred to it more frequently. The ICJ instead referred to the 1974 Definition for the first time in the case *Military and Paramilitary Activities in and against Nicaragua*. The ICJ has relied on the 3314 GA Resolution to deal with cases concerning the use of force (Nicaragua, Armed Activities, Oil Platform cases). However, in relation to the 1974 Resolution, it referred to article 3(g), specifically on acts that can be treated as armed attacks.[165]. Yet, article 3(g) of the Definition of Aggression, as annexed to resolution 3314 (1974), does not establish acts of aggression. The ICJ has referred to the 1974 resolution to confirm that the use of force is an armed attack, but it has never made explicit reference to acts of aggression, nor when referring to an unlawful use of force. The 1974 Definition of Aggression did not touch upon individual responsibility but lingered over the more generally understood - less critical - international responsibility in relation to

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[161] See for further explanation Bruha, T. (2016). *supra note 143,* p. 159-160, citing also Ferencz, B. B. (n/d) *supra note 34,* Vol. II at 28.

[162] See Article 2 of the Definition of Aggression (1974) General Assembly resolution 3314 (XXIX): "*...although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."*

[163] Art. 5, Definition of Aggression, annexed to the General Assembly Resolution 3314 (XXIX) (14 December 1974),

[164] See Security Council resolutions: Res. 386 (1976), Res. 387 (1976), Res. 405 (1977) Res. 411 (1977), Res. 418 (1977), Res. 419 (1977), Res. 423 (1978), Res. 424 (1978), Res. 428 (1978), Res. 455 (1979), Res. 447 (1979), Res. 454 (1979), Res. 475 (1980), Res. 496 (1981), Res. 507 (1982), Res. 527 (1982), Res. 535 (1983); Res. 546 (1984), Res. 554 (1984), Res. 567 (1985), Res. 568 (1985), Res. 571 (1985), Res. 572 (1985), Res. 573 (1985) Res. 574 (1985), Res. 577 (1985), Res. 580 (1985), Res. 581 (1986) , Res. 602 (1987), Res. 611 (1988), Res. 667 (1990)

[165] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (27 June 1986), Merits, Judgment, ICJ Reports.

aggression by states. Resolution 3314 has nevertheless been useful for the work of international courts and for the ILC works on the draft statute for an international criminal court.

4.3. *Aggression at the ICJ*

The ICJ has never been a direct contributor to the development of the definition of aggression. It has never found a state committing acts of aggression or qualified an unlawful use of force as an act of aggression[166], nor has it analysed or endeavoured in efforts to define its substantial concept. However, the ICJ has indirectly contributed to find a definition of aggression in relation to the state conduct element. In this respect, the ICJ jurisprudence entails the development of the law in relation to the prohibition of the use of force.

ICJ cases that discussed or touched upon the use of force have been the Nicaragua v. USA[167], the Case Concerning Oil Platforms[168], Wall Case, Armed Activities DRC v. Uganda[169], Nuclear Weapons[170] and the Wall case advisory opinion[171] and in the Corfu Channel case[172]. The Court has relied on the Definition of Aggression annexed to the GA resolution 3314 in the Oil Platform case, in the Nicaragua case and in the armed activities case. The DRC v. Uganda case is an example in which the ICJ is called upon to pronounce upon allegations of aggression and refers to Article 3(g) of the GA resolution 3314 (XXIX) of 1974.

As Akande and Tzanakopoulos[173] showed, in the Nicaragua case the threshold for the use of force to amount to an armed attack depends on the gravity of such use of force. The concept of armed attack gains importance in the analysis because article 51 allows for the use of force only in relation to armed attack. The UN Charter indeed, does not differentiate the use

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166 Akande, D., & Tzanakopoulos, A. (2016). The International Court of Justice and the Concept of Aggression. In C. Kreß & S. Barriga (Eds.), The Crime of Aggression: A Commentary (pp. 214-232). Cambridge: Cambridge University Press. p. 219

167 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ Reports (1986), 14, p. 101, para. 191

168 Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Merits), ICJ Reports (2003), at 161

169 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC)v. Uganda), ICJ Reports (2005), at 168, at 180, para. 23

170 Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons case) (Advisory Opinion), ICJ Reports (1996), at 226.

171 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall case) (Advisory Opinion), ICJ Reports (2004), at 136.

172 The Corfu Channel case (United Kingdom v. Albania) (Merits), ICJ Reports (1949), 4.

173 See the argument made by Akande, D., & Tzanakopoulos, A. (2016), *supra note 166*.

of force from n armed attack on the basis of a gravity threshold. As briefly touched upon earlier, the ICJ has referred to the 1974 resolution to confirm that the use of force is an armed attack. This allowed the ICC to set a gravity threshold that distinguishes armed attack from the mere use of force. It is the ICJ that requires that *armed attack* is of greater gravity than the *mere use of force.* However, the use of the gravity threshold as expressed in 1974 Resolution 3314 seems to make *armed attack* nearly equal to *act of aggression*[174]. However, the act of aggression as for the 2010 Amendment on the crime of aggression[175] holds a higher standard of gravity than armed attack.[176] An act of aggression *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations* (Art. 8bis ICCSt). The ICJ has never set proper standards of gravity on which the threshold would lie, but it did set a series of determinations of it. In using gravity to set the higher status of the threshold seems to imply that the gravity of the act will determine the rise of a mere use of force to armed attack and further to act of aggression as for 1974 Resolution 3314 that is *"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"*[177], and therefore - along the line Article 2(4) of the Charter - a breach of a peremptory norm for which the responsibility of the state for internationally wrongful acts is triggered. This pattern that establishes aggression under the framework of international state responsibility, parallels to the pattern which would be used to establish aggression under international criminal law. Starting from the use of force, the seriousness of the acts would rise the gravity threshold into acts of aggression and further to war of aggression that is considered a crime against international peace.[178] Article 2 of the 1974 Definition of Aggression establishes a gravity threshold, necessary to distinguish between acts that amount to the use of force, and those that amount to aggression because of sufficient gravity. An act of aggression as provided by resolution 3314 entails the responsibility of a state, a war of aggression the responsibility of individuals. The gravity threshold would allow to distinguish between acts that entail the use of force from acts of a sufficient gravity so to rise to state responsibility or individual criminal responsibility. The point of convergence of the

174 See the Nicaragua case, *supra note 167,* at 103, para. 195
175 Article 8*bis,* Rome Statute
176 See the argument made by Akande, D., & Tzanakopoulos, A. (2016), *supra note 166.* p. 226 - 227
177 Definition of Aggression, annexed to the General Assembly Resolution 3314 (XXIX) (14 December 1974)
178 Article 4 (2), Definition of Aggression, annexed to the General Assembly Resolution 3314 (XXIX) (14 December 1974).

ICJ jurisprudence on the use of force and the concept of an act of aggression can be understood as being the gravity threshold has expressed in the 1974 Resolution. The ICJ jurisprudence has never established the step from act of aggression to war of aggression, and therefore the step from the violation of the prohibition of the use of force to international crimes.

Despite not directly contributing to the construction of the crime of aggression and the formation of its definition, the case law of the ICJ could be used in support of the interpretation efforts of aggression, and in understanding its scope and application.

Some of the notions the ICJ has used in its jurisprudence when distinguishing between different types of illegal use of force have later become part of Article *8bis* of the Rome Statute.

4.4. *The work of the International Law Commission*

At its second session that unfolded between June and July 1950, the International Law Commission adopted the Principles of International Law recognized in the Charter and in the Judgment of the Nuremberg Tribunal[179].

Principle VI reads:

The crimes hereinafter set out are punishable as crimes under international law,

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).[180]

[179] Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316), Yearbook of the International Law Commission 1950, vol. II, p. 365

[180] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950), United Nations (2005). Yearbook of the International Law Commission 1950, Vol. II, United Nations (1957). Text of the Nürnberg Principles Adopted by the International Law Commission, Formulation of the Nürnberg Principles, A/CN.4/L.2, Yearbook of the International Law Commission, (1950) Vol. II.

These principles represented the first ground-breaking step towards making the crime of aggression widely accepted as a norm of customary international law.

Since their adoption, the GA invited the Commission to delve into two trails, on the one side the draft code of offences and on the other a definition of aggression. Drafting the code of offences became the main project of the Commission comprised of the attempt to define aggression.[181] In 1951, the first version of the draft code of offences against the peace and security of mankind was ready and handed over to the General Assembly with commentaries. It consisted of five articles, and the notion of aggression was part of it.

Article 1 characterized offences against the peace and security of mankind as crimes under international law rising to individual criminal responsibility.[182] Article 2 entered a list of acts qualifying as the actus reus of the offence. It reads:

"The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State

(3) …"[183]

The expression "any act of aggression" lies first on the list[184]. The wording of this opening article sought to set the premises of a consistency with the 380 (V) 1950 GA Resolution, the United Nations Charter and the Nuremberg Charter. It conformed with the wording of Resolution 380 (V) adopted by the General Assembly in November 1950 in asserting that any act of aggression "is the gravest of all crimes against peace and security"[185]. It recalls the UN Charter in the prohibition of the use of force and acts of aggression with the only two exceptions being articles 42 and 51 of the Charter and it draws from article 6(a) of the Nuremberg Charter which is almost entirely incorporated within the meaning of Article 2(1)

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181 Draft Code of Crimes against the Peace and Security of Mankind (7 December 1987) Resolution 42 General Assembly, A/RES/42/151

182 Article 1, 1951 ILC Draft Code of Offences, with Commentary. In Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux preparatoires of the crime of aggression. (Crime of aggression library). Cambridge University Press. p. 150

183 Ibid. Article 2

184 Ibid. Article 2(1)

185 Ibid. Commentary to Article 2(1), p. 150

of the Draft Code. Most of the other acts listed in Article 2 were constructed following the same pattern. Article 2(2) and Article 3 dealt with the attribution of criminal responsibility to high-ranking state officials but, despite the shared idea that only state authorities were to be prosecuted for aggression, Article 2(12) of the code provides for offences such as conspiracy and incitement by private individuals. For the first time there is an explicit reference to intent in Article 2(9), while Articles 4 and 5 covered defence of superior orders and determination of penalties, respectively.

In the commentary to the draft articles the ILC clarified that in addition to the use of armed force "*no attempt is made to enumerate such acts exhaustively* and *aggression can be committed also by other acts".*[186] The 1954 version of the Draft Code left unchanged Article 1 and 2 paras (1) to (3). However, the list of acts had a much broader scope. It included "*organization, encouragement of organization of armed band by the State; the toleration of those armed bands and of the use of the State territory for incursions"*[187], activities to foment civil strife (Article 2(5)), terrorist acts (Art. 2(7)), annexation (Art. 2(8)), economic and political coercive measures (Article 2(9)). The 1954 version was *overly expanded.* As for above, political tensions of those years and reluctance to define aggression brought the GA not to take any more action on the Code and to postpone considerations of the draft for nearly twenty years.

It was only in 1981 that the GA invited the ILC to resume its work on the Draft Code of Offences Against the Peace and Security of Mankind.[188] In November 1990, the ILC was requested by the GA to start considerations over the Statute of a permanent international criminal court.[189] The new task the ILC had to carry out complicated the process of elaboration of the draft articles of the code[190] which were eventually adopted in 1991 and transmitted to governments for comments and observations.[191] In 1992 the Commission

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186 Ibid.

187 Article 2(4) 1954 ILC Draft Code of Offences, with Commentary. In Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux preparatoires of the crime of aggression. (Crime of aggression library). Cambridge University Press.

188 Resolution 36/106. Draft Code of Offences Against the Peace and Security of Mankind (10 December 1981) General Assembly, 92nd plenary meeting, A/RES/36/106

189 Resolution 45/51, Report of the International Law Commission on the Work of its forty-second session. (1990) General Assembly 48th plenary meetings, A/RES/45/41. Provisional verbatim record of the 48th meeting (28 November 1990) New York, General Assembly 45th session A/45/PV.48 without vote

190 Jean, A. and Jones, J. (1997) A patchwork of norms: a commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind. European Journal of International Law, 8 (1997). p 100.

191 Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, Yearbook of the International Law Commission (1994) vol. II (2). para. 28

established a working group on the Statute. In 1993 the ILC transmitted the draft of the working group to the GA and was then urged to continue its work on the Statute as a matter of priority[192]. Relying on the comments of the Sixth Committee[193] in 1994 the ILC elaborated the final sixty-articles version of the draft Statute for an International Criminal Court and straightforwardly adopted it. The crimes within the jurisdiction of the Court were the same of the post-war military tribunals, exception made for the terminology of crimes against peace that turned into crime of aggression. For what concerns the Draft Code of Offences, the drafting Committee continued to work on the Draft Code until its adoption in 1996[194] comprising of twenty draft articles[195]. The first offence listed in the Draft Code was *crimes against peace.* Despite the ILC reaffirmed the *personal jurisdiction* scope of the draft to cover individuals and not states, it also reaffirmed that to determine whether aggression by a State occurred fell within the responsibilities of the Security Council. Only then individual criminal responsibility for aggression could rise.

One of the major points of disagreement in drafting both the Drafts Code and Statute was on the role of the Security Council. While the role of the Council is to take measures against aggression and threats of aggression for the maintenance of peace and security, the judicial body aims at punishing those perpetrating aggression. The former should be separated from the latter. The idea of enabling a political organ such as the Security Council to exercise its authority over an offence that should fall under the jurisdiction of an independent and impartial Court seemed unreasonable.

The 1974 GA Resolution 3314 could not be reproduced in a Code of Offences, as judges deserved discretion in qualifying acts constituting aggression. Other members though believed that in any case the judicial body should be subordinated to the political body regardless of the need of the Council's determination of aggression. Eventually, the compromise that was reached left the role of the Security Council as primary and omitted the list of acts.

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192 Report of the International Law Commission on the work of its forty-fifth session. General Assembly Resolution 48/31, 48th Session, Supplement No. 49. A/48/49 (1993). at 328, para 6, p. 2.

193 Observations of Governments on the report of the Working Group on a draft statute for an international criminal court, on the Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court. (1994) vol. II (1) A/CN.4/458 and Add.1 – 8

194 Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) United Nations (2005)

195 Ibid. para 50.

When the General Assembly commissioned the drafting of the Code to the ILC, most of the available sources in terms of international criminal law (such as the GA 3314 Resolution) did not yet exist. The Draft Code developed through a fast-paced changing international background. Both the Draft Code and the Draft Statute were born parallel to the *ad hoc* international criminal tribunals for the former Yugoslavia [196] and other significant international law developments[197].

4.4.1. Aggression in the Draft Statute

The 1994 ILC Draft Statute included under article 20(b) the crime of aggression as a crime within the jurisdiction of the Court.

The Statute does not give any further guidance on the crime. It does not define it, nor it provides for any element of the crime. The absence of any treaty provision on the crime together with the strongly state-related formulation of the 1974 definition of aggression given by the GA Resolution 3314 made the elaboration of the crime of aggression difficult. Many members of the Sixth Committee believed that the customary nature of such a rule would cover only the *waging of a war of aggression* as was given by the post-war tribunals but no other acts of aggression[198]. However, the ILC justified its drafting choice on the ground that it is not the function of a statute to codify crimes[199]. Elements of significance in relation to aggression in the Draft statute were to be found under the provisions of its Articles. In particular, Article 23(2) provides:

"A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint." [200]

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196 Security Council Resolution 827 (25 May 1993). 3217th meeting S/RES/827. See also Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (3 May 1993) S/25704.

197 See for instance, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, case before the International Court of Justice. See also the Rwandan ad hoc tribunal (ICTR) established by Security Council Resolution 955 8 November 1994 3453rd meeting S/RES/955

198 See Commentary, in 1994 ILC Draft Statute, with Commentary (excerpts), in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 191 – 192

199 Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May–22 July 1994) International Law Commission, A/49/10, Yearbook of the ILC (1994), vol. II, part 2 -1, p. 38 at (4)

200 Article 23 (2) Draft Statute for an International Criminal Court with commentaries (1994), United Nations (2005)

It is specifically directed at the charge of aggression. The State has to be held responsible to have committed aggression by the Security Council in accordance with Chapter VII of the UN Charter before individual criminal responsibility is alleged[201].

4.4.2. Aggression in the Draft Code

The 1951 first draft of the code included in its body both aggression and the threat of aggression under Article 2 paragraph 1 and paragraph 2 respectively. Same remained with the revised version of the Draft Code submitted in 1954.

The 1991 version instead made two different and more extensive provisions out of the two paragraphs: Article 15 on aggression and Article 16 on threats of aggression. This choice was grounded on Article 2(4) of the UN Charter, on the 1970 Principles of International Law Concerning Friendly Relations and Cooperation Amongst States (GA Res 2625 (XXV) 24 Oct 1970) and on the ICJ Nicaragua decision.[202]Article 15 was an overly wide-ranging provision with a long list of acts qualifying for the offences.

Article 16 more simply read,

"A threat of aggression:
1. An individual who as leader or organizer plans, commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .].
2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State".[203]

The threat of aggression as enshrined in the above Article 16 was then omitted from the text of the 1996 final draft. In the 1996 version Article 16 was about aggression and introduced a much shorter, but broader in scope, definition than that of the previous drafts. It simply reads:

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[201] Para. 8 of the Commentary to Article 23, Draft Statute (1994), *supra note 193.*

[202] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ Reports (1986), 14. Article 16, Note 2, 1991 ILC Draft Code of Crimes, with Commentary (excerpts). in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 188

[203] Article 16, 1991 ILC Draft Code of Crimes, with Commentary (excerpts). in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 188

"An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression." [204]

The formulation of the crime of aggression in Article 16 of the Draft Code relied on that of the London Charter. As the ILC Commentary containing Art 16 elucidates, individual responsibility rises only if the conduct of the State violates the prohibition of the use of force as provided for in Article 2(4) of the UN Charter. To amount to a violation of the Charter and to qualify as aggression the conduct has to be sufficiently serious. The wording of the provision confirms the nature of the State element in the criminalization of aggression. It creates the *conditio sine qua non* for the attribution of individual criminal liability and established the existence of a gravity threshold. This articulation dissociates from that of the GA Resolution 3314 (XXIX) but draws near to that of Article 19 "International Crimes and International Delicts" of the Articles on the Responsibility of States for internationally wrongful acts provisionally adopted in 1976[205] and to the 1994 Draft Statute[206].

In 1995 the GA established an *ad hoc* committee open to all member states to review substantive issues arising out of the draft statute and to decide on the convening of an international conference of plenipotentiaries for the "establishment of an international criminal court[207].

4.5. *Concluding observations*

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[204] Article 16, 1996 ILC Draft Code of Crimes, with Commentary (excerpts). in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 199.

[205] Draft article 19, para 1. "An Act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached. This article was proposed on first reading but ultimately deleted from the Articles on the Responsibility of States for Internationally Wrongful Acts. Para 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime. Para 3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, interalia, from: (d) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression". Draft Article 19, Draft Articles on State Responsibility, International Law Commission, UN Doc. A/51/332

[206] Article 23(2), Draft Statute (1994), *supra note 193. "*A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."

[207] Establishment of an International Criminal Court, Resolution 49/53 (17 February 1995) General Assembly, para 2; para 6

Looking at the final versions of the Draft Statute and of the Draft Code of Offences, the decades of efforts carried out by the ILC resulted into two separate instruments. Both essential for the future progress of international criminal law, they were later largely used for the establishment of the international criminal court and the codification of the crime of aggression which did not unveil any ground-breaking innovation from the trends that already existed. Both in relation to state responsibility and individual liability for aggression, the outcome of the ILC efforts did not distance from the General Assembly 1974 Definition, nor it solved its shortcomings. The discussion at the various forums and their result were a *quasi*-repetition of previous debates and negotiations that led to the adoption of the GA 3314 Resolution.

5. **Getting to the final journey for a treaty-based aggression**

5.1. *The ultimate run leading up to Rome*

The adoption of the draft statute for an international criminal court delivered by the ILC in 1994 did not attempt to define the crime of aggression. This task was left to the Draft Code that progressed on a parallel line.

In 1995 the GA established an *ad hoc* committee open to all Member States to review substantive issues arising out of the draft statute and to decide on the convening of an international conference of plenipotentiaries for the "establishment of an international criminal court"[208].

Division within the committee continued to raise on including or not the crime within the jurisdiction of the Court. On the one side, there were those who believed that with all the efforts in Nuremberg, Tokyo, the GA Res 3314 and the ILC endeavours it would be somehow illogical not to include aggression within the jurisdiction of the new international criminal court. However, those opposing to its inclusion saw the challenges that a definition of aggression would raise proportionally overcoming its benefits[209] and the previous efforts not helpful either. Being Nuremberg strongly context-related, Tokyo heavily controversial, and

[208] Ibid. para 2 and 6

[209] 1995 Ad Hoc Committee Report (excerpts), para. 63 – 64, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 205 --206

Resolution 3314 referring to States and not to individuals, the decision to omit the crime of aggression from the new Court's jurisdiction was not necessarily inappropriate. As well, many did not see aggression as capable of legal regulation. In pursuance to article 39 of the United Nation Charter it is the role of the Council to establish that an act of aggression has occurred. This entails that an act of aggression exists only if the Council characterizes it as such and no other legal standards exist to do it. The Council is a political body and such determination becomes political by definition. An act of aggression is an act of state and, as McDougall illustrates[210], it entails a political situation that the Council, a political body, has to asses in the interest of peace and security. Council's members enjoy major powers, including veto, that creates a political bias in decisions of the Council based on political considerations in the interest of peace and security.[211] This view, that remains heatedly felt in today's debates, was counter-argued by those who defended the Charter-based nature of the prohibition of aggression which makes, as for them, inherently legal.[212]

Accordingly, major controversial subject of discussion was article 23(2) of the Draft Statute requiring the Security Council to determine *a priori* the existence of an act of aggression at the hands of a State.

The debates of the *ad hoc* committee were soaked in the dichotomy justice and political peace. The degree of consistency that a judicial body could reach in relation to the functions and regime-nature of the Security Council was strongly questioned.[213]

The *ad hoc* Committee submitted its report to the GA in December 1995 and a Preparatory Committee was established merging together the ILC draft, the 1995 Report and states' comments on the way towards a Convention[214]

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[210] McDougall, C. (2013). *supra note 91*. McDougall, C. (2007). When Law and Reality Clash - The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression. International Criminal Law Review vol. 7(2-3). p. 281.

[211] De Wet, E. (2004). The Chapter VII Powers of the United Nations Security Council (Vol. 3). Hart Publishing.

[212] 1995 Ad Hoc Committee Report (excerpts), para. 68, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 207

[213] Ibid. para 70. See also Ibid. paras 122 and 123.

[214] GA Res. 50/46, Establishment of an international criminal court (1995), 50th Session, Agenda Item 142, A/RES/50/46.

The Draft Code was a source of reference for the Preparatory Committee that was oscillating between the GA resolution, Nuremberg and Tokyo to uphold the principle of legality, and the ILC line of approach[215].

In August 1996, parallel to the concluding stages of the ILC work on the Draft Code defining aggression, the Preparatory Committee produced a compilation of proposals [216] that embraced the list of acts of the 1974 GA Res 3314, defined aggression and discussed the role of the Security Council[217].

One of the proposals deleted article 23(2)[218] while another read:

"Should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation."[219]

Two major proposals sworn in: that of Germany in February 1997[220] and that of Italy and Egypt[221] (1997). These two proposals were the two major building blocks in the 1997 PrepCom Sessions. They were the pioneers of the wording "exercising control"[222], "for the purposes of the Statute", "gravity" and "sufficient gravity", as well as of the separated concepts of State's act and action from that of crime committed by a person.

The February 1997 Draft of the *ad hoc c*ommittee included the above-mentioned new elements and added the conduct elements of the crime qualified as being in "contravention

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215 Report of the Preparatory Committee on the Establishment of an International Criminal Court (1996) Proceedings of the Preparatory Committee during March-April and August 1996, Volume I, A/51/22. paras 65 -73

216 Compilation of Proposals, Report of the Preparatory Committee on the Establishment of an International Criminal Court vol. II, General Assembly 51st Session. A/51/22

217 1996 PrepCom Compilation of Proposals (excerpts), in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 215 – 219.

218 Ibid. p. 217.

219 Ibid. para (c), p 219

220 Proposal for a Definition of the Crime of Aggression Submitted by the Delegation of Germany (19 February 1997) A/AC.249/1997/WG.1/DP.3, in 1997 Proposal by Germany (February), in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, supra note 182, pp. *223 -225.*

221 Proposal submitted by Egypt and Italy on the definition of Aggression (21 February 1997) A/AC.249/1997/WG.1/DP.6 in 1999 Compilation of Proposals, in 1997 Proposal by Egypt and Italy, Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 226 - 227.

222 Ibid. *supra note 220 and 221.*

of the Charter of the United Nations as determined by the Security Council"[223]. This reflected the trend that the debates over the involvement of political elements within judicial processes was taking.

Germany submitted again its proposal in December 1997. The German stand remained that of the importance of the inclusion of aggression in the Statute, to be short, self-sustained and not in breach of the *nullum crimen sine lege* principles. However, while it did not agree with the Security Council having exclusive powers to determine aggression, it also stressed on the importance that the primary responsibility of the Council in maintaining peace and security remained unimpaired and therefore Art 23(3) of the ILC Draft Statute integral to its position[224].

The subsequent sessions of the PrepCom in 1997 and the intersessional PrepCom meeting in Zutphen in 1998 brought a few variations but not much innovation to the text.

The last formal meeting before the Conference in Rome run from 16 March to 3 April 1998 and produced the revised 1998 German Proposal[225] and the 1998 PrepCom Draft Statute[226]. For what concerns the former, there were not many variations from previous drafts and there was no hint at the concept of a war of aggression but only at "armed attack" in relation to the State Act. The 1998 Draft Statute by the PrepCom instead merged both the 1997, the Zutphen and the revised German proposals.

5.2. *The Rome Conference*

The adoption of the Statute of the ICC[227] (hereinafter ICCSt or Rome Statute) was the final act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that took place in Rome between 15 June and 17 July 1998. The crime of aggression was one of the most difficult subjects the Conference had to

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223 Preparatory Committee on the Establishment of an Internationaal Criminal Court (11-21 February 1997), 5th Session. 1997 PrepCom Draft Definition (Excerpt), in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182.* pp. 228 – 229.

224 1997 Proposal by Germany (December), in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 233 - 237.

225 1998 Revised German Proposal, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 247.

226 1998 PrepCom Draft Statute, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 248-251

227 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) Rome. A/CONF.183/10)

deal with. It was not surprising that in the final stage for the establishment of the Court, both the definition of, and the jurisdictional regime over, the crime of aggression were not agreed upon. Eventually, Article 5 of the Rome Statute included the crime of aggression within the list of crimes upon which the Court exercises jurisdiction. However, according to Article 5(2) and Article 123 of the ICCSt, the activation of the jurisdiction of the Court over the crime of aggression was postponed until further negotiation at the Review Conference.

In the plenary sessions in Rome, support for the inclusion of the crime within the Court jurisdiction was rather extensive. Points of strong disagreement however would raise around elements and technicalities already encountered in the various negotiating phases between 1945 and 1998.

Germany drew from its revised proposal which became an *informal discussion paper available to delegations*[228], favouring the compromise found in option 3 of the PrepCom Draft[229] and dropping the idea of Res 3314[230]. Other countries like Syria[231], Egypt[232] or Iran[233] for instance would favour the inclusion of Res 3314 Definition. China on the other hand did just set two conditions to be met to include the crime in the jurisdiction of the Court: a clear and precise definition and a link with the Security Council[234].

On 6 July the Bureau presented a Discussion Paper[235] in which under *Option 2* affirmed:

Discussions are still ongoing as to the inclusion of the crime of aggression and on the definition. In particular, elements from General Assembly resolution 3314 may be inserted in the definition[236].

The proposal also contained an option granting powers to the Security Council to request a deferral of twelve months. This option was kept[237].

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228 Para 19, 1998 Rome Statute Records (18 June) (excerpts) in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. p. 255

229 See para. 20 1998 Rome Statute Records (18 June), excerpts, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 256. Option 3. 1998 PrepCom Draft Statute, in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 250 – 251.

230 Ibid, para 22

231 Ibid. para 25

232 Ibid. para 128

233 Ibid. para 149

234 Ibid. para 9

235 Bureau Discussion Paper (6 July 1998) A/CONF.183/C.1/L.53.in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 277 – 279.

236 Ibid.

237 Bureau Discussion Paper (6 July 1998) A/CONF.183/C.1/L.53. p 279

In the following meetings and debates in July 1998, consensus was never reached in relation to aggression. The idea of omitting the crime from the jurisdiction of the Court was taking ground. In the Bureau Proposal of 10 July 1998, aggression was dropped from the crimes listed. Decision over the inclusion of aggression together with other crimes was deferred[238]. Instead of being omitted, the crime was inserted in the list together with the other crimes without further explanation or provision and a future preparatory commission was to be mandated for further considerations over it[239].

On 17 July 1998 the Rome Statute was adopted to enter into force on 1 July 2002[240]. The crime of aggression was part of the jurisdiction of the Court as provided in Article 5(1)(d) of the Statute.

However, as for Article 5(2):

"The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with article 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"[241].

Differently from the other crimes for which jurisdiction had begun upon entry into force of the Statute, jurisdiction over the crime of aggression was deferred to further negotiations.

This means that the Rome Conference failed only in part on the question of aggression. It was part of the Statute and therefore under the jurisdiction of the ICC. How to exercise that jurisdiction was deferred until consensus was reached.

5.3. *At the final rounds: Kampala*

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238 "The crime of aggression and one or more of the treaty crimes (terrorism, drug trafficking and crimes against United Nations personnel) may be inserted in the draft Statute if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July. If this is not possible, the Bureau will propose that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference." cit. Article 5, Bureau Proposal (10 July 1998). in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 304

239 On the same footprint of the Azerbaijan idea. See 1998 Rome Summary Records (13 July, 3.00 p.m.)(excerpt). In in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* p. 307, at 55.

240 See Article 126(1), ICCSt

241 Article 5(2), ICCSt

Resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, established the Preparatory Commission for the Establishment of an International Criminal Court that was entrusted to carry further the work on the definition and on the Court's exercise of jurisdiction over the crime of aggression[242].

The PrepComm established in 1999 a Working Group on the Crime of Aggression (WGCA) mandated to prepare proposals on the crime to be adopted at the Review Conference[243].

The permanent members of the Security Council showed at first very reluctant to consider the definition of the crime of aggression a priority and in the first year the work proceeded slowly[244]. Priorities lied more on the rules of procedure and the elements of crimes[245]. However, with the finalization of the rules of procedure and evidence at the end of 1999 the attitude started to change. The WGCA issued a provisional text with proposals and guiding questions on the definition, the exercise of jurisdiction and the role of the Council[246]. The only element everyone seemed to have always agreed upon was that the crime of aggression is a leadership crime, perpetrated by those holding a political or military leadership role with decision making powers. However, the definition was still an unresolved question. To address this question was not eased by all the collective efforts made since the aftermath of World War II. As a matter of fact, what was aggression under customary law was still dubious. This made all the process even more challenging. Between June 2000 and March 2001 efforts focused solely on specific definitional issues[247].

In the 2002 Discussion Paper proposed by the Coordinator of the WGCA the threshold requirement was brought up. The state act was clearly distinguished from the individual

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242 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an - International Criminal Court, UN Doc. A/CONF.183/10 (1998), Annex I.

243 Proceedings of the Preparatory Commission at its 2nd session (26 July-13 August 1999). Preparatory Commission for the International Criminal Court. PCNICC/1999/L.4/Rev.1. See also McDougall, C. (2013). *supra note 91.* p. 12

244 In the Travaux Preparaoires for instance at the first session there is only the 1999 Proposal by Arab States. in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 333 – 337. at 62.

245 Amendements. in Barriga, S., Kress, C., & Grover, L. (Eds.) (2012) The travaux préparatoires, *supra note 182.* pp. 8-9; Politi, M., & Nesi, G. (Eds.). (2005). The International Criminal Court and the Crime of Aggression. Routledge pp. 44- 45.

246 The Debate within the Preparatory Commission, in Politi, M., & Nesi, G. (Eds.) (2005). *supra note 245.* p. 45

247 Ibid. p. 46

conduct, the *mens rea* and *actus reus* elements discussed[248]. The threshold requirement was introduced in reference to the GA Resolution 3314 Definition of Aggression for which an act of aggression is an act that by "its character, gravity and scale, constitute a flagrant violation of the Charter of the United Nations"[249]. At the end of ten sessions held between February 1999 and July 2002 the PrepComm failed to accomplish its mandate under resolution F.[250]

On July 2002, with the entry into force of the Rome Statute, pursuant to Article 122 of the ICCSt the Assembly of States Parties came into being taking over on the work left by the PrepComm and establishing in 2003 the Special Working Group on the Crime of Aggression[251] (hereinafter SWGCA) chaired by Ambassador Wenaweser. The SWGCA was open to all states irrespective of their ratification status to the Rome Statute and civil society. The SWGCA conveyed in its work negotiation experts, representatives of states and NGOs. The SWGCA was not given much time to work on aggression during the early formal meetings, other issues were more pressing for the ASP at that time[252]. Following the suggestions of Ambassador Wensaweser to bring back at the centre of the ASP table the question of the crime of aggression, four meetings were organized at the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School of Princeton University[253]. Unfolding between 2004 and 2007, the four sessions are known as the Princeton Process framed on an informal intersessional setting to allow out of the box discussions and brainstorming freed from political tensions in the hope that it would facilitate also a proactive involvement of the civil society representatives.

The SWGCA managed within less than six years to accomplish the PrepComm mandate and elaborated proposals on the crime of aggression as provided for in article 5(2) of the Statute.

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248 Definition of the crime of aggression and conditions for the exercise of jurisdiction. Discussion paper by the Coordinator. UN Preparatory Commission for the International Criminal Court (2002) New York. Working Group on the Crime of Aggression. See also Barriga, S., Kress, C., & Grover, L. (Eds.) (2012). The travaux préparatoires, *supra note 182,* pp. 10 -11.

249 Discussion Paper proposed by the Coordinator, Report of the Preparatory Commission for the International Criminal Court (continued), PCNICC/2002/2/Add.2, p. 3

250 Barriga, S. (2012) Negotiating the Amendments on the crime of aggression. in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* See also Politi, M., & Nesi, G. (Eds.). (2005), *supra note 245.* pp. 43-51.

251 Resolution on Continuity of Work in Respect of the Crime of Aggression (9 September 2002) Resolution ICC-ASP/1/Res.1, 3rd plenary meeting, adopted by consensus.

252 See Barriga (2012) *supra note 250.* p. 15

253 Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression (21 – 23 June 2004) Liechenstein Institute on Self Determination. Woodrow Wilson School, Princeton University, New Jersey, United States ICC-ASP/3/SWGCA/INF.1. ASP Official Records. ICC-ASP/3/25, Annex II, 341.

A final report was submitted by the SWGCA to the ASP on 13 February 2009 adopting the proposals[254]. It deleted article 5(2) and introduced draft article 8bis providing a definition of the crime of aggression including the definition of the State Act[255] taking from GA Resolution 3314. In 2006 during the SWGCA the majority expressed support for a general chapeau based on Res 3314 and in June 2007 in Princeton the Chairman idea to include the wording of articles 1 to 3 of 3314 Resolution providing for the basic structure of the chapeau element and list of crimes was received with success[256]. The conditions for the Court's exercise of jurisdiction and the role of the Security Council were drafted in the new article 15bis[257]. During the negotiations, support for the introduction of the ICJ as third body in terms of jurisdictional compromise to ensure the Court independence raised but it soon waned[258].

Debates on the Council's role in the determination of acts of aggression continued also in Princeton. At the Princeton Process agreements were reached on the fact that the Council's determination of aggression should have not prejudiced the Court's findings. Such proposals were submitted in 2006 and 2007[259] and remained until Kampala.[260] In relation to the modes of liability, draft article 25(3bis) narrows criminal responsibility to leaders only[261].

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254 SWGCA Report (2009). in in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* pp. 648 – 662.

255 Article 8bis, 2009 SWGCA Proposals, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* pp. 663 - 664

256 2007 Chairman's Non-paper on the Definition of the State Act of Aggression in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* Barriga (2012) *supra note 250.* p. 26

257 2009 SWGCA Proposals, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* pp. 664- 665

258 See Definition of the crime of aggression and conditions for the exercise of jurisdiction: Discussion paper proposed by the coordinator (1 April 2002 PCNICC/2002/WGCA/RT.1) Preparatory Commission for the International Criminal Court, New York. Proposal by the Netherlands concerning PCNICC/2002/WGCA/RT.1 (17 April 2002 PCNICC/2002/WGCA/DP.1) Preparatory Commission for the International Criminal Court, New York. Coordinator's proposal, Discussion Paper on the Crime of Aggression Proposed by the Chairman (16 January 2007) ICC Doc. ICC-ASP/5/SWGCA/2 Assembly of States Parties resumed 5th Session. Proposal by Bosnia and Herzegovina, New Zealand and Romania (23 February 2001) UN Doc. PCNICC/ 2001/WGCA/DP.1 Preparatory Commission 7th session.; McDougall, C. (2013). *supra note 91.* p. 17.

259 Report on the Informal Intersessional Meeting at Princeton (5 September 2006) ICC-ASP/5/SWGCA/INF.1, 5th Session, Special Working Group on the Crime of Aggression, The Hague. paras 70 – 72; 54; 60.

260 The SWGCA draft of November 2008 indicated the autonomous but complementary roles of the Court and the Council. In 2009 the SWGCA reached an agreement that "a determination of aggression by an organ outside the court shall be without prejudice to the Court's own findings". This remained the same in sub-paragraph 15*bis* and *ter* adopted in Kampala. See Barriga (2012) *supra note 250.* p. 31. See also Report of the Special Working Group on the Crime of Aggression (February 2009) ICC-ASP/7/20/Add.1. para 22.

261 See Article 25(3 bis). 2009 SWGCA Proposals, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* p. 665

While being circulated through the Secretary-General of the UN, the ASP submitted the proposals to the Review Conference without bringing any change.

Between February 2009 and the Review Conference in May 2010, a strongly political phase entered the scene. The ASP used this period to continue working on solidifying the most controversial issues, the various states engaged in domestic consultations, and political momentum to secure what had been achieved was sought. Important was the shift in rights and privileges for non-state parties to the Statute, allowed to participate at the ASP as observer states but deprived of their right to vote.

In June 2009, another Princeton meeting was held in preparation for Kampala.

A Chairmen Non-Paper on the Exercise of Jurisdiction (2009) was then circulated for considerations bringing on the table a new structure and terminology more prone to enhance substantive focus during the Conference. In November 2009 the eight sessions of the ASP took place at which the US delegation participated for the first time since 2001 and during which the ASP adopted by consensus the SWGCA proposal.[262]

The first Review Conference of the Rome Statute was held in Kampala, Uganda from 31 May to 11 June 2010 gathering together States Parties, Observer States and representatives of the civil society.

Three Conference Room Papers on the Crime of Aggression [263] were submitted and circulated during the Conference bringing on the table all the elements that the crime of aggression entailed and some options for new compromises[264]. Although the draft definition of the crime reached a general consensus, the major issues in Kampala versed around the jurisdictional conditions. Was the Security Council the chosen one to hold major power in the pursuit of peace and security or was it the Court? Regardless of the nature of the crime which entails double responsibility, the two main elements that challenged the ability to reach consensus were the consent of the State to trigger the Court's exercise of jurisdiction and the relationship between the Council and the Court.

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[262] ASP Review Conference. Resolution ICC-ASP/8/Res.6. 8th plenary meeting (26 November 2009) by consensus.

[263] Conference Room Paper on the Crime of Aggression Rev. 2, RC/WGCA/l/Rev.2, in Report of the Working Group on the Crime of Aggression 2010.

[264] For a more in-depth account of the three Conference papers please see the Travaux Preparatoires, p. 727-733, 743-748, 754-760. See also, Barriga: amendments, 2012, pp 47 – 50. see also McDougall, C. (2013). *supra note 91.* p. 26

At the first formal debate on 4 June 2010 the US representative introduced five additional *Understandings* to address its discontent over the definition and jurisdictional provisions. The understandings attempted to narrow down the definition of the crime and to make the threshold elements of gravity, scale and character self-reliant[265].

Important was the CABS (or ABSC) Proposal[266] presented on 9 June, a combination of the ABS Proposal (Argentina, Brazil, Switzerland)[267] and the Canadian[268] one that distinguished between the Council and the State referrals laying the foundations for the final compromise. Key features were a non-exclusive Security Council determination and a consent-based regime.

The five permanent members of the Security Council (China, Russia, France, the UK and the US herein after the P5) were those pushing for the exclusive power of the Security Council over prosecutions of aggression.[269]

The president presented three papers containing draft resolutions of the crime[270] that conveyed all in the President's Final Compromise Proposal[271] on 11 June 2010. The various debates around article 15 eventually resulted in the creation of two different articles: 15bis on State Referral and the prosecutor's *proprio motu* and 15ter dealing with the Security Council Referral[272].

On the same day, consultations among the groups resulted into a general acceptance of the final compromise except for a few countries that still concerned or unwilling such as UK,

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265 McDougall, C. (2013). *supra note 91.* p. 25

266 See Compromise Proposal ABS-Canada, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note182.* p. 772. McDougall, C. (2013). *supra note 91.* p. 27. See Barriga (2012) *supra note 250.* p. 51

267 See 2010 Non-Paper by Argentina, Brazil and Switzerland (ABS), in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* p. 740

268 2010 Non-Paper by Canada 2010, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* p. 753

269 See Van Schaack, B. (2010). Negotiating at the interface of power and law: the crime of aggression. Colum. J. Transnat'l L., 49. p. 514. McDougall, C. (2013). *supra note 91.* pp. 210. See also Certain expenses of the United Nations case (1962) ICJ at 163; Nicaragua v. United States case (1986) ICJ at 434. The Wall in the Occupied Palestinian Territory Advisory Opinion (2004) ICJ at 136 where the ICJ stresses that the responsibility for the maintenance of peace and security is primary and not exclusive as for article 24(1) of the UN Charter.

270 See 2010 President's Draft Paper; 2010 President's Second Paper; 2010 President's Third Paper in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* pp. 774 - 796

271 See 2010 President's Final Compromise Proposal, Untitled text, 11 June 2010, 11pm, distributed by the President at the 13th plenary meeting of the Review Conference, in Barriga, S., Kress, C. (Eds.) (2012). The travaux préparatoires, *supra note 182.* p. 772. McDougall, C. (2013). *supra note 91.* at 153, p. 804.

272 See Articles 15*bis* and 15*ter ICCSt* (2010). See also Ambos, K. (2010). The crime of aggression after Kampala. German YB Int'l L., 53, 463. at 52, p. 123.

France, Japan and the US. The revised draft resolution was submitted to the Review Conference for votes and finally adopted by consensus[273].

On 11 June 2010 new Article 8bis defining the crime of aggression, Article 15bis and article 15ter defining the exercise of jurisdiction were adopted by consensus together with relevant provisions in the Elements of Crimes[274]. Articles 8bis built a clear link to the UN Charter on the actus reus of the offence and Arts15bis and 15ter contained provisions for the court's exercise of jurisdiction and the role of the Security Council[275]. The prosecution was given more independent action. The triggering of the Court's exercise of jurisdiction was conditional on its activation *after January 2017* after consent by the two-third majority of States Parties as for the adoption of the amendments[276].

Palestine was the thirtieth state to ratify the amendment in June 2016, necessary for the activation. At the sixteenth session of the ASP running from 4 to 14 December 2017 in New York at the United Nations Headquarter, six new judges were elected for a nine-year term mandate and six resolutions were adopted by consensus on the activation of the Court's jurisdiction, on the amendments to the Rome Statute, on cooperation, budgeting and other matters[277]. On 15 December 2017 States Parties to the ICCSt agreed with the adoption of the resolution that enter into force on 17 July 2018[278].

Disappointments over the amendments were numerous. The fact that the Court could not have jurisdiction over acts of aggression carried out by nationals of non-state-parties or of state parties that did not have ratified the amendments, or on their territory raised many concerns. Mostly considering that none of the five permanent members of the Council can be subject to the jurisdiction of the Court over aggression.

6. **What is the crime of Aggression? Concluding remarks**

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273 The Crime of Aggression, (11 June 2010) 13th Plenary Meeting, Review Conference, Resolution RC/Res.6.

274 Ibid.; Judge Sang-Hyun Song, Former President of the ICC, Triffterer, O., & In Ambos, K. (2016). Rome Statute of the International Criminal Court: A commentary. p. XIII

275 See Amended Articles 8*bis,* 15*bis* and 15*ter* of the ICCSt.

276 See 122 and article 121(3), Rome Statute. See Barriga (2012) *supra note 250.* p. 56.

277 See Sixteenth Session of the Assembly of States Parties (4 to 14 December 2017) United Nations, New York. See also ICC ASP Resolutions (18/12/2017) at ICC 2017/2018 - 16th Session - Resolutions

278 Activation of the jurisdiction of the Court over the crime of aggression (14 December 2017) ASP16/ICC-ASP-16-Res5-ENG, 13th Plenary Meeting. adopted by consensus

The crime of aggression is a crime committed by a leader or a policy-maker exercising effective control in the planning, preparation, initiation or execution of an act of aggression carried out by a State which is manifestly in contravention to the UN Charter.

As Robert Cryer wrote, preventing acts of aggression is one of the primary purposes of the United Nations.[279]

The complexity of the crime of aggression, in its development, codification and in the nature of the crime itself was primarily given by its double character in terms of the types of liability it develops, the institutional bodies it involves and the capacity to protect and encroach on State sovereignty.

The ambiguities that the crime raised since the very early time of its existence were intrinsic to the dichotomies law and politics, justice and maintenance of peace and security.

The legal instruments drafted – and sometimes adopted - from the 1919 Treaty of Versailles, the 1924 Protocol for the Pacific Settlement of International Disputes, and up to the 1998 Rome Conference and the 2010 Kampala Review Conference, have formed the foundations for the debates on aggression as international crime.

Already in Nuremberg and Tokyo the bench was divided between positive legal reasoning based upon the dictates of natural law, and the moral responsibility that the two forums carried within them to deliver international justice as vehicle for the achievement of enduring peace and security.

With the Cold War, states and international institutions were soaked in political fluctuations to a degree that their approach towards defining aggression became highly inconsistent. After the adoption of the Nuremberg Principles considerations over the definition of aggression were postponed until the 1970s.

In 1970, General Assembly Resolution 2625 considered war of aggression to be a crime against peace. In 1974 General Assembly Resolution 3314 adopted the first written definition of aggression very much similar to the definition submitted by Jackson at the London Conference in 1945.

The complexity of the concept of aggression continued to be reflected also in the efforts undertaken by the ILC. It can eventually be inferred that the ILC did not make effective

[279] Cryer, R., Robinson, D., & Vasiliev, S. (2019). An Introduction to International Criminal Law and Procedure (4th ed.). Cambridge: Cambridge University Press. p. 297

attempts to frame the meaning of aggression in terms of individual responsibility separate from that given by GA resolution 3314.

Throughout those years of codification, many states did not see the enactment of a definition of aggression a *sine qua non* condition for the prosecution of international acts of aggression. Aggression was considered as crystallized in customary international law. The use of the UN Charter together with the Nuremberg precedent could give rise to individual criminal responsibility for those acts[280].

Again, in 1998, with the closing of the Rome Conference, aggression was under the jurisdiction of the court, but it needed further work. The struggle for codification of the crime of aggression was not concluded with the establishment of the International Criminal Court. A definition of aggression was not found until very recent times, thanks to a series of efforts that concluded in 2010 with the adoption of the amendments in Kampala.

The compromise reached in Kampala by consensus was an important achievement of the international community. For the first time, both individual and state conduct for the crime of aggression were defined and adopted in a legally binding document. Yet, the acts listed in paragraph 2 of article 8*bis* are the same of article 3 of the definition of aggression annexed to resolution 3314 (1974).

From the features and the analysis drawn in this chapter, it is possible to affirm that the General Assembly has been conspicuously present throughout much of the post World War II period in relation to the development of the definition of the crime of aggression and influential in the final stages of its development.

In the dichotomy between maintenance of peace and security and justice, that was also reflected in their institutional dimension between political entity and judicial institutions, the General Assembly seems to seat in the middle. GA Resolution 3314 (1974) deals with aggression by states and cannot be considered an instrument for criminal law purposes. The definition annexed to the resolution is not considered as customary in its entirety, the ICJ has referred specifically to article 3 of the Definition as being customary. On the other hand, the GA affirmed the Nuremberg Principles, and charged the ILC to work on a Code of Offences against the Peace and Security of Mankind and on a Draft Statute for an international criminal court. The ILC embarked therefore in the attempt to define aggression and to

[280] See the situation in Iraq (1990) and the plan to prosecute Saddam Hussein as reported in Pecorella, G. (2021). The United States of America and the crime of aggression. Routledge. pp. 176 – 181.

establish a permanent judicial institution. The ILC remained within the margins of the provisions of the UN Charter (articles 2(4), 1(1), 53(1)) and the General Assembly 1974 Definition.

Institutionally, the actors involved in this long process embraced the dichotomy through the interplay between aggression *qua* exceptionally serious breach of international obligations for which states may be held responsible, and aggression *qua* international crime raising individual criminal responsibility. This resumes what the General Assembly was attempting to do as opposed to the ILC attempts during the overlapping years of their work.

The definition given by the different relevant institutions, either judicial or political, are linked to the Security Council. Only the customary counterpart[281] may not be linked to it *as much.* The maintenance of peace and security is enshrined in the preamble of the ICC Statute as superior value to be protected by the Court. The decision to continue with efforts in Kampala in order to reach agreement over the definition of aggression was to legitimate the mandate of the Court as worded in its preamble and to retain the work in Rome as accomplished.

[281] See The IMT Charter and the 1974 Resolution 3314. The text of the 1974 Definition of Aggression indeed, seems to grant the Council seems more of an ancillary role, given by the use of the term *may* (Article 2). Therefore, it is part of the definition but *not as much* as the role it had been granted at the later negotiations.

CHAPTER III

Part One

Chinese legal culture in the International Legal Order

1. Introduction

3. Legal culture in Ancient China: internal and external mechanisms
   3.1. Pre-imperial China: a very ancient legal order
   3.2. The birth of Confucianism and major schools of thought: a bridge to the imperial era
   3.3. Criminal law in Confucian-driven imperial China

4. China and International Law
   4.1. Early prototypes of a Chinese-made international law
   4.2. The Tribute System
   4.3. A New System of Foreign Relations: The Opium Wars and the Introduction of International Law in Modern China
   4.4. International law from the establishment of the People's Republic of China to today

5. The People's Republic of China: from its founding to modern times
   5.1. Evolution of a living constitution
   5.2. Criminal law and domestic judicial bodies
      5.2.1. International echo of a domestic criminal system

6. Conclusion

1. **Introduction**

Modern international legal order entered the Chinese tradition rather ruthlessly. International law as we understand it today was far out of the Chinese historical view of the world order until recent times. The sinocentric system around which the far eastern region developed was

sound enough to endure thousands of years until western powers aggressively challenged it in the nineteenth century. Despite China had to set on, and grow upon, different pillars to adapt to the new world order that was governed primarily by non-Chinese standards, it managed to recreate its own approach and attitude in line with that of an interdependent global community. In doing so, China maintained a series of elements that are part of its culture and tradition, granting a unique character to the country in its engagement with, among other fields, international justice.

This first part of the chapter is basically an introductory section that aims at giving a brief account of the Chinese legal culture. It will include the philosophical, historical, and socio-political aspects of such a millenarian civilization from its early tradition to modern times.

As explanatory record, it will be functional to understand more comprehensively the country role and attitude towards the dichotomy between justice and maintenance of international peace and security upon which this research is conceived.

2. **Legal culture in Ancient China: internal and external mechanisms**

2.1. *Pre-imperial China: a very ancient legal order*

The history of China in its unique culture dates back to approximately 5000 years ago[1].

Historians commonly identify the early prototype of the Chinese legal system with the Xia dynasty (2010 – 1600 BC), the first dynasty of the "Chinese non-prehistoric" tradition when early prototypes of State-organized systems emerged. At that time, the normative sphere was mostly made of rites and customs normalized into unwritten social norms and complemented with State rules that were used to preserve order and to show devotion to the King. The term that was used to designate these norms was *Li*禮, and the penalties imposed in violation of *Li*禮 were called *Xing*刑[2].

This archetypal model of a criminal system developed gradually through the advancement of the civilization. Under the Zhou Dynasty (1046 – 256 BC) for instance, types of

[1] Wang, T. (1990). International law in China: historical and contemporary perspectives (Collected Courses of the Hague Academy of International Law, Volume 221). Martinus Nijhoff. Brill Reference Online accessed on 10 February 2020.

[2] This was considered the proper law of the time. See Goldin, P. R. (2011). Persistent misconceptions about Chinese "legalism". *Journal of Chinese Philosophy*, *38*(1), p. 6.

punishment started to follow a precise hierarchy and divided into five different categories (*Wu Xing* 五刑 Five Punishments) according to the gravity of the act or offence in violation of *Li*禮[3].

With the Spring and Autumn Period (*chunqiu* 春秋 [771 – 476 BC] that fell within the first period of the Eastern Zhou Dynasty [770 – 221BC])[4] early forms of statutory written law developed on bronze tripod vessels, named *xing ding* (刑鼎) and the use of unwritten norms (*li*禮) was temporarily abandoned[5]. This kind of progresses were mostly aimed at social order, stability, and peace[6].

2.2. *The birth of Confucianism and major schools of thought: a bridge to the imperial era*

Major schools of thought around legal philosophy and theories of justice and jurisprudence to foster peace and stability also originated in those years. The Confucian and Legalist schools[7] were the most known and influential philosophies[8] that shaped the traditional Chinese legal system[9].

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[3] See Zhang, M. (2010). The socialist legal system with Chinese characteristics: China's discourse for the rule of law and a bitter experience. Temp. Int'l & Comp. LJ, 24. pp. 9 and 19.

[4] The Spring and Autumn period was the period of Confucius and other important thinkers of ancient China. Spring and Autumn takes the name after a Confucius' work, that tells stories on the Confucius State, Lu.

[5] Wang, W. et al. (N/D) A Study on Ancient Rituals in China, Chinese Academy of Social Sciences p. 8

[6] Stanford Encyclopaedia of Philosophy, Legalism in Chinese Philosophy. Available at https://plato.stanford.edu/entries/chinese-legalism/#DefLeg accessed on 22 November 2021. With no diplomatic means as we would know today, the only option for scholars and officials of that time to settles disputes and reach peace, was to introduce to concept of Tian Xia 天下, meaning *All Under Heaven. T*he legalists seemed to be the most pragmatic in finding an answer to this need. *Ibid.*

[7] *Rujia* 儒家 Confucianism, and *fajia* 法家 Legalism. The term legalism has received many critics in his current use. Goldin, P. R. (2011), *supra note 2, p. 6 – 9* defines the translation of Fajia with legalism as inaccurate and useless. The concept of *Fajia* rather referred to the idea that social status should be disregarded to favour human equality. As well, it did not mean law but covers a broader linguistic range that can be better recognised in the concepts of "standard" or "method". At that time, the notion of *law* would have been more appropriately identified in the concept of *Xing.* See Goldin, P. R. (2011), *supra note 2.* pp. 6 – 15.

[8] It is incongruent, then, to discuss the *fajia* within the context of the Occidental notion of "the rule of law," as was popular in early modern Chinese scholarship.

[9] Sima Tan 司馬談, historian of the Han Dynasty, and father of the later well-known historian Sima Qian 司馬遷 is the author of the book on the essential features of the six schools of thought, *lun liujia yaozhi* 論六家要旨 that emerged starting from those years of change. According to his work, the fajia school abandoned hierarchical differences while being very severe and rigid (Shiji 史記 130:3289). See also Smith, K. (2003). Sima Tan and the Invention of Daoism, "Legalism," et cetera. (The Journal of Asian Studies, 62(1)) Cambridge University Press, pp. 129–156.

According to the legalist thought, rules and methods were the only possible option towards the attainment of individual's well-being. Self-interest lied at the basis of the human nature that had to be regulated not to result into evil behaviours. This understanding was encompassed within the meaning of *Fa* 法 (method) merged with the notion of *Li*禮 and equally applied to everyone regardless of the social status or any other hierarchical categorizations. *Fa* 法 was the new *Xing* 刑, and the idea of equal punishment before the law (*Yi Xing* 一刑) was promoted. Legalists' purpose of punishment was primarily deterrence. Their pragmatism would allow harsh punishment as far as it brought to a constructive outcome[10]. As Sima Tan observed, the anti-hierarchical approach together with skepticism against traditional moral discourse, resulted into the premature dissolution of the legalist approach[11].

Confucianism instead, accepted human beings as inherently good. Based on the writings of Confucius, Confucianism focused on moral virtues characterized by benevolence *(ren* 仁) and filial Piety (*xiao* 孝) and framed within three principles: 仁 (*ren)* which stands for *benevolence* and *humanity;* 禮/礼(*li)* which stands for *proper behaviour* or *ritual; and* 义 (*yi) justice, righteousness*[12].

These principles and virtues were enforced through rituals. They had to be learnt through practice and repetition (ritual, *li*) so to be internalised and become *discipline*[13]. This scheme coordinated relations between classes by way of order and righteousness. Governing practices were soaked into morality that replaced criminal law and dictated legislations. Moral persuasion, mediation and discipline were fundamental to maintain social order and to reach harmony. Laws and punishments should have only existed as extra options[14]. This means that the ritual *li* held a normative value that guided the authorities to punish the violator of the law[15]. Along with such mechanisms, filial piety and standards of hierarchical

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10 Muhlhahn, K. (2009). Criminal justice in China: A history. Harvard University Press. p. 20; see also Zhang, M. (2010)., *supra note 3. M*ain practices and features of legalism relates to punishment as mean to maintain the ruler's authority.

11 Feng, Y. (2010) Legal culture in China: A comparison to Western law. Comparative Law Journal of the Pacific 16. pg. 116. See also Smith, K. (2003), *supra note 9.*

12 *Confucius*, The Analects of Confucius, 15:18, avaliable at https://ctext.org/analects/wei-ling-gong accessed on 25 February 2020.

13 Bell, D. A., & Chaibong, H. (Eds.). (2003). Confucianism for the modern world. Cambridge University Press. pp. 218 – 233.

14 Feng, Y. (2010), *supra note 11,* p. 116

15 For an extensive account on the ruling by *li*, see In, K. J. (2003). The rule of law and the rule of virtue: On the necessity for their mutual integration. Korea Journal, vol. 43(1).

subordination were all part of the same code of conduct[16]. The child to the parent, the wife to the husband, the young to the elder and the citizen to the government, each relation legitimised the authority of the so-called *Confucian ruler*. Confucianism, social harmony and subordination to the authority are all values that have emerged in contemporary Chinese governance and is an influential device to certain policy interests.

A third school of thought is Mohism. Developed from the teachings of 墨翟*Mo di* (often referred to as Mozi), Mohism was known to formulate ethical and political theories that comprised inclusive moral and political order, opposition to military aggression, dedication to pragmatism and support for "a centralized, authoritarian state led by a virtuous, benevolent sovereign and managed by a hierarchical, merit-based bureaucracy"[17].

These schools of thought that flourished at the time of Confucius in pre-imperial China permeated all levels of the ancient Chinese society and favoured a series of internal changes that were carried onto the age of the unified empire. Despite changes in the socio-legal system along with a degree of social progress that came mainly with advent of the Tang Dynasty, the broader functioning of the system sat on a *quasi*- fixed normative framework based on philosophical Confucian dictates that lasted until the fall of the last imperial dynasty in the twenty century. It is not surprising for instance that mechanisms and institutions of the Chinese traditional criminal justice system, including concepts of crimes and punishment, can be found in the country's approach to justice in the twentieth century. Criminal law in the Confucian-driven imperial China dominated over any kind of civil-like law[18].

2.3.*Criminal law in Confucian-driven imperial China*

Within the above-mentioned hierarchy scheme, treatment and punishment depended on the social status of the alleged individual. If two defendants with different social status committed the same offence against somebody of a higher or lower rank, the severity of punishment would be granted differently according to the status of the offender and that of

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16 Filial piety (孝 xiao) is the Chinese notion of being obedient and devoted to one's parent and elder family members, and to take care of them. It lies at the basis of the Confucian moral conduct and the concept of social harmony as imposed by *li*. "Xiao." in Encyclopædia Britannica, (Inc.), available at www.britannica.com/topic/xiao-Confucianism accessed on 11 November 2021.

17 Mohism, Stanford Encyclopedia of Philosophy. Available at https://plato.stanford.edu/entries/mohism/ accessed last on 11 November 2021.

18 Mühlhahn, K. (2009), *supra note 10,* pp. 14-15

the victim in relation to every single offender. The misbehaviour of higher officials against lower-rank individuals could result in the reduction or the waiving of the sentence.

China however was very advanced since its early dynasties with lenient sentences for the most vulnerable, specific criteria for death penalties and appeal mechanisms[19].

The Tang Code[20] was the most influential legal code of the imperial age. It codified the *Li* into a written legal norm and the concept of *Xing* into the systematized *Fa.* It created the legislative structure and rendered the Chinese legal system fully developed[21].

The Tang Dynasty was the first to advance the idea of grave crimes and to properly codify them. The Code listed ten categories known as the *ten abominations* (*Shi E*十惡) which were the most serious crimes in violation of the three cardinal guides and five constant virtues upon which death penalty was inflicted.

There were three judicial bodies corresponding to three judicial chief ministries, *san fa si,* 三法司[22]:

1 the Board of Punishments, *xing bu*, 刑部, was the highest appellate court of the imperial system, considered the top legislative body. It enjoyed both legislative and prosecution powers and was charged with the classification of criminal punishments, law-drafting and review, and with reviewing judgements on death penalty and exile;

2 the Court of Revision, *da li si* 大理寺 also translated as Imperial Court of Justice, similar to a national supreme court but non independent, was in charge of case adjudication (exception made for death penalty and exile)

3 the Tribunal of Censor *yu shi tai* 御史台, that successively became the Chief surveillance Office, *du cha yuan* 督察院, in charge of officials' supervision at the central and local level.[23]

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19 Criminal justice during the Han Dynasty was already advanced in its structure and application and comprised the first forms of leniency for the vulnerable or mentally ill. According to the Sancong Sanyou (三纵,三宥) regime, persons with mental disability were waved from prosecution. The Lüqiu (录囚) regime required multiple reviews in cases resulted in death sentences, and according to the Qiushen Qiujue (秋审秋决) practice death penalties could only be carried out during autumn. The Zhuzi fushen (逐级复审) regime allowed multiple appeals at different levels. See Feng, Y. (2010), *supra note 14,* p. 117

20 Enacted during the Tang Dynasty (618 – 907 AD)

21 Zhang, M. (2010), *supra note 3.* pp. 23 – 25. The ranking system under the Tang Criminal law classified "eight privileged positions", *ba yi*八議, comprising of high-ranking individuals and members of the imperial family, government officials and their relatives who could benefit from special prosecutorial procedures and a reduction of punishment. See Feng, Y. (2010), *supra note 14,* pp. 118 – 119

22 The three branches system endured throughout the whole imperial age until the nineteenth century. See Zhang, M. (2010), *supra note 3.* pp. 26 – 27.

23 See also Mühlhahn, K. (2009), *supra note 10,* p. 27

The power of final adjudication rested with the emperor.

3. China and International Law

3.1. *Early prototypes of a Chinese-made international law*

Besides embryonic models of criminal systems and governing philosophies, ancient China was also cradle for early prototypes of international law. Before the unification of the country, inter-state relationships were built on treaties and conflicts were regulated by the laws of war[24]. War-time norms included respect for the non-combatants and the rights of the neutrals; they required that wars were waged for just reasons and attacks launched only after a drum-sound to give time to prepare for defence[25]. Dispute settlement practices and events to discuss interstate activities were common practice and involved the active participation of state leaders and their representatives.

Already in 546 AD, following a disarmament conference, a *league*-like entity to end wars was established. The league failed in its mandate and similarly to the events of the twentieth century, conflicts escalated. Reference to the above-mentioned disarmament conference and to the league was made at the League of Nations in 1919, that recognized it as its first ancestor[26].

Since the unification, the idea of the empire as a sole unified whole was normalised to a degree that such a unified whole was understood as universal. This was the presumption upon which the Chinese sinocentric world view was built. Through centuries China developed a such a sino-centric regional order that influenced and ruled over the surrounding countries[27]. The Confucian doctrine was also reflected in the mechanisms that operated at the inter-state level. China behaved like a father and required the surrounding countries to behave like its son, with submission and respect.[28]

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24 Wang, T. (1990), *supra note 1*. accessed online on 10 February 2020.

25 *Ibid.*

26 *Ibid.*

27 Fairbank, J. K. (1973). The Chinese World Order. Traditional China´ s Foreign Relations. VRÜ Verfassung und Recht in Übersee, 7(1), 86-91. p. 2

28 The tribute system is a proper example of non-Chinese countries subordination to the Chinese world order. See Hsü, I. C. (2013). China's Entrance into the Family of Nations. Harvard University Press. pp. 3-4. This

The strength of the Chinese influence over its surrounding countries created a cultural region based on Chinese values. Relationships with neighbouring countries were not based on the principle of sovereignty but were built on Confucian principles of benevolence and obedience. They maintained the hierarchical structure [29] that guaranteed the Chinese emperor's absolute authority and exalted the *three cardinal guides* and *five constant virtues*[30] as ideological devices.

Throughout the whole imperial age, the emperor had the highest authority above any other power, secular or religious. He was vested with supreme legislative, judicial and executive powers, and the law was just a tool to preserve the Emperor's power.

In the Shijing (詩經) "Book of Odes":

"溥天之下、莫非王土。率土之濱、莫非王臣。"[31]

Under the vast heaven, there is nothing but the land of the Emperor. Within the shorelines of the land, there is no one but the Emperor's vassals[32]

The legal system that developed under this belief comprised laws binding on everyone except for the emperor. There was no separation of powers between the executive, administrative supervisory system and the judiciary, nor with the police. The chief justice was also chief officer, while higher officials supervised lower officials and heard appeal cases[33].

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system of supremacy did not remove all military, emperors often had the tendency to be ambitious war leaders. Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

29 The Chapter Qu li (曲禮 "Minute Rituals") of the book Liji (禮記 Records of Rituals) recites: 禮不下庶人, 刑不上大夫 Li (禮) does not reach common ordinary people; Xing (刑) does not get to senior/high ranking officials1

30 Three Cardinal Guides (ruler guides subject, father guides son, and husband guides wife) and the Five Constant Virtues (benevolence, righteousness, propriety, knowledge, and sincerity). See Zhang, M. (2010), *supra note 3.* pp 21 – 23

31 Book of Odes, Chap. II; 詩 經, 小雅， 北山

32 Authors' translation. The two most known translations for this passage are: Hsü, I. C. (2013), *supra note 28,* p. 6. "Under the whole heaven, there is no land that is not the Emperor's, and within the sea-boundaries of the land, there is none who is not a subject of the Emperor" and Legge, J. (1861). The Chinese Classics: Vol. 3, Part 2. p. 360 "Where're their arch the heavens expand, the king can claim the land below. Within the sea bounds of the lands, all at his summons come and go"

33 Feng, Y. (2010), *supra note 14,* p. 118.

The above mentioned three philosophies alternated and overlapped throughout the imperial dynasties. Confucianism was the most favoured and was made state ideology since the Han Dynasty 漢朝 (206 BC – 220 AD) until the end of imperial China.

The imperial age in China lasted for more than two thousand years until the overthrown of the last emperor and the collapsed of the Qing dynasty (1911), shortly before the outbreak of World War I.

It was not far back therefore when the whole country stopped living under the imperial formula[34].

3.2. *The Tribute System*

The tribute system is one of the main representations of the sinocentric supremacy over the subordinated *outside* world. It survived several dynasties starting with the Ming (1368 - 1644) and was dismantled only in the twentieth century with the end of imperial China (1911)[35]. The tribute system framed and systematised a whole apparatus of foreign relations between the empire and the subordinated countries, called "tributary states".

One of the key elements of the tribute system that epitomizes its mechanics was the *ketou* 磕头[36] a ritual to show reverence and respect to the emperor[37]. According to the *ketou* ceremony the representative of the tributary state, or who on his behalf, had to kneel before the emperor as a sign of surrender[38].

By acceptance of the inferior status subordinated countries could politically, financially and culturally benefit from the Chinese empire. It was a *win-win* situation that allowed China to expand over almost thirty countries[39].

It was a solid system that lasted for thousands of years. The cooperative and anti-warlike nature that it retained built on the policy of non-intervention, was the fundamental of its

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34 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

35 See Hsü, I. C. (2013), *supra note 28,* pp. 3- 18. Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020. For a further analysis on the tribute system see Mancall, M. (2013). The Ch'ing tribute system: An interpretive essay. In Fairbank, J. K. (1968) The Chinese world order. Cambridge: Harvard University Press.

36 More commonly known as kowtow.

37 Such ritual could also be used in family and social contexts.

38 See Mancall, M. (2013), *supra note 35.*

39 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

success. Weaknesses and instability emerged only with the opium wars and the interference of western imperialist powers.

3.3. *A New System of Foreign Relations: The Opium Wars and the Introduction of International Law in Modern China*

The Qing dynasty (1644 – 1911) of Manchurian ethnicity was the last dynasty of imperial China. While it kept its own ethnic customs, it maintained the solid Chinese traditional norms and power structure until they were overturned by western supremacy.

It was under the Qing dynasty that sinocentrism encountered the euro-centric egotisms. Europeans in the eighteen-century accepted as true only their western world order, infringed the traditional rules of the Chinese tribute system and waged wars[40]. The first *casus belli* of the European encroachment was the trading of opium with Britain[41] that created serious issues among the Chinese population. Mr Lin Zexu (林则徐), appointed imperial commissioner by the Qing Emperor, tried to deal with the issue by learning the customs and laws of the "enemy". He read Emmerich de Vattel's *Le Droit des Gens*, and published a Chinese version titled *Geguo Luli*各国律例, Laws of All Nations[42]. He also tried to reach out to Queen Victoria in the United Kingdom but nothing changed[43]. Hostilities broke out in the 1860s. At the same epoch international law was officially introduced. The translation of *Elements of International Law in* Chinese and its adoption and publication by the *Zongli Yamen* 总理衙门, the Office for General Administration of Affairs of Various Countries[44] was the major manifestation of such a change. For China, international law was clearly made by and for Europeans only and considered it incompatible with the Chinese legal order. However, it was useful in that moment and they had no choice but to learn it[45].

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40 Jones, W. C. (2003). Trying to understand the current Chinese legal system. Understanding China's Legal System: Essays in Honor of Jerome A. Cohen, New York University Press. p. 18

41 Chan, P. C. (2014). China's approaches to international law since the Opium War, Leiden Journal of International Law, 27(4), p. 865

42 Chen, S. (2017). Translation and ideology: A study of Lin Zexu's translation activities. Meta: journal des traducteurs/Meta: Translators' Journal, 62(2). para. 51

43 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.p. 230.

44 The Zongli Yamen, the Office for General Administration of Affairs of Various Countries was established in 1861. It was the successor of the Board of Rites and the office to Administer Foreign Barbarians, the two main bodies of the tribute system, and precuros of today's Chinese Ministry of Foreign Affairs (Wai wu bu 外务部, since 1901). See Wang, D. (2005). China's unequal treaties: narrating national history. Lexington books. p. 36.

45 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

Western military superiority led to the subversion of Chinese sovereign integrity and resulted in a series of unequal treaties China had to sign[46]. China became the subordinate country and had no choice but to give up to that millennial system and surrender to the western one.

The new order of unequal treaties with China was based upon power, threat, force and inequality. Treaties favoured the foreigners and violated China independence and sovereignty. The era of the unequal treaties' regime was a form of diplomatic aggression and lasted for almost 100 years. The Chinese referred to it as the century of humiliation[47].

The first of a long series of unequal treaties was the treaty of Nanjing. Signed in 1842 between China and the UK, it ended the first Opium War. It was signed as a friendly peace treaty under which terms China had to pay the British an indemnity, handover the territory of Hong Kong, agree to establish trade fees and to open five Chinese ports to British trade.

Amongst the most relevant that followed the treaty of Nanjing there was the Treaty of the Bogue (1843), that brought British courts and tribunals into the Chinese territory to try the British and grant them specific rights. Furthermore, the Treaty of Wangxia with the United States (1844) and the Treaty of Whampoa with France (1844), that were the American and French versions of the Sino-British Treaty of Nanjing. They implied the opening of the five ports for trade, extraterritorial privileges and jurisdiction over their nationals accused of crimes committed in China[48]. Foreign courts were created with the belief that Chinese law was barbarous[49].

Article 16 of the Treaty of Tianjin (1858) between the British and China stated:

Chinese subjects who may be guilty of any criminal act towards British subjects shall be arrested and punished by the Chinese authorities according to the laws of China.

See Zhaojie, L. (2002). Traditional Chinese World Order. Chinese Journal of International Law, p. 39. Also, see Chan, P. W. (2015) China, state sovereignty and international legal order. Hotei Publishing. p. 68 and Chan, P. C. (2014), *supra note 41,* pp. 862 - 863.

46 Cohen, J. A. (2000) Forward. in The Rule of Law: Perspectives from the Pacific Rim, Washington, D.C.: Mansfield Center for Pacific Affairs, p. xi

47 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020. Tiqiang, C. (1984). The People's Republic of China and public international law. Dalhousie LJ, 8, 3. pp. 4-6.

48 France also obtained the right to establish Churches. Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020 p. 239. C Chan, P. C. (2014), *supra note 41,* pp. 866 – 867

49 Jones, W. C. (2003), *supra note 40,* pp. 18 – 20; Gong, G. W. (1984). The standard of" civilization" in international society. p. 146 – 147

British subjects who may commit any crime in China shall be tried and punished by the Consul, or other public functionary authorised thereto, according to the laws of Great Britain. Justice shall be equitably and impartially administered on both sides[50].

When a Chinese lodged a complaint against a British citizen, both the Chinese and British sides had to examine the case[51].

Other treaties forced China to pay additional indemnities and open ports to foreign trade so that western imperialist powers could travel freely within China. Regardless of a strong reluctance from the Chinese, some of those treaties allowed for western powers permanent diplomatic representation in the Chinese capital. This was considered the major challenge to the superiority of the imperial Chinese authority and threat to the tribute system.

Many other foreign powers such as Russia, Belgium, Norway, Sweden and Japan followed suit and established treaties under *duress*. China lost its sovereignty over many of its territories. The history of unequal treaties ended only in 1943 during World War II and the founding of the PRC.

The most known treaty concluded under coercion was that with Japan in 1915. Known as the *twenty-one demands* the Japanese government presented an ultimatum to Beijing made of twenty-one requests, amongst which they asked for concessions over the Shandong region and Manchuria[52].

Between the end of the 19th century and early 20th century, the increasing western sphere of influence left not choice for China but to enter a westernization movement as only viable answer. Many Chinese scholars moved to the US, Europe and Japan, western-style schools established in China, and foreign legal codes were adopted.

A legal reform movement *wuxu bianfa* 戊戌变法 started in 1889 and introduced western elements in the Chinese political and legal systems. There were Japanese jurists to work as legal advisors to the imperial government[53]. The Chinese that were returning from abroad

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50 Article 16, Sino-British Treaty of Tianjin (1858). available at https://oelawhk.lib.hku.hk/items/show/1025 accessed on 24 November 2021.

51 *Ibid.* Articles 16 – 17

52 See Naraoka, S. (2017). Japan's Twenty-One Demands and Anglo-Japanese relations (Britain's Retreat from Empire in East Asia, 1905-1980) Taylor & Francis for an extensive explanation of the facts and the content of the twenty-one demands. See also for a further in-depth analysis Naraoka, S. (2014). A New Look at Japan's Twenty-One Demands: Reconsidering Katō Takaaki's Motives in 1915, (The Decade of the Great War). Leiden, The Netherlands: Brill.

53 See Zhang, M. (2010), *supra note 3.* pp. 11, 29.

China started to reject the imperial system. This led to the *Xin Hai* Revolution 辛亥革命 led by Sun Yat-sen that overthrew the empire[54]. The end of imperial China led to the establishment of the Republic of China. The Confucian-driven traditional system remained dormant until the twenty-first century.

Sun Yat-sen (1913 – 1925) was the first to advocate for new democratic principles: The *Three People's Principles* – democracy, nationalism, and socialism – and the *Fours Powers of the People* - suffrage, recall, initiative, and referendum – for a newly free, flourishing and powerful China. He also believed in the importance of the division of powers into five branches - executive, legislative, judicial, civil service examination, censorate[55].

During World War I China joined the allies and required that the Shandong Peninsula, occupied by Germany under one of the unequal treaties, would return to China before any Japanese occupation. With the end of the war, the Europeans supported Japan and the German territories were transferred to the administration of the Japanese Empire under the Sino-German treaty (1898) and article 156 of the Treaty of Versailles. This was known as the Shandong problem and led China to refuse to sign the Treaty of Versailles[56].

With the Paris Peace Conference (1919) in the aftermath of World War I and the creation of the League of Nations, Sun Yat-sen tried to regain the territorial sovereignty and integrity lost with the unequal treaties of the 19th century.

The Shandong Problem caused hunger amongst the Chinese population against western supremacy that resulted in the May 4th movement in 1919, during which Marxist-Leninist ideas started to spread and the Communist Party to form.

With the death of Sun Yat-sen (1925), Chiang Kai-shek leader of the Kuomintang (KMT) carried on his struggle to free the country from unequal treaties.

In 1928 the KMT Ministry of Foreign Affairs declared that the unequal treaties between the ROC and other countries were to be concluded *ipso facto*[57]. In 1931, he resorted to Article 11 of the same Covenant in defence of Chinese sovereign rights over Japanese concessions in Manchuria[58]. Yet, on the same year Japan invaded Manchuria.

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54 *Ibid.* p. 11

55 The Principle of Democracy (1924) Sun Yat-sen (primary source document with questions). Available at http://afe.easia.columbia.edu/ps/cup/sun_yatsen_democracy.pdf accessed on 24 November 2021

56 Streich, P. (2019). The Ever-Changing Sino-Japanese Rivalry. Routledge. pp. 67 – 68. The Shandong problem was later addressed at the Washington Conference in 1922, and the Shandong Peninsula returned to China.

57 Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

58 Article 11, Covenant of the League of Nations (1919)

This triggered the reaction of the US ambassador to China who regarded the Japanese action as a planned act of aggression. In 1932 the Stimson doctrine was issued affirming that conquests with acts of aggression do not grant the invader sovereign rights over the invaded territory[59] .

With the outbreak of World War II and the geopolitical changes it carried, most of the unequal treaties (except for the British rule over Hong Kong) were abrogated and new treaties signed.

In such a context, China started to use international law to defend its state sovereignty.

With the end of WWII, the quest for change was soaked with communist notions that started with the May 4th movement. This brought to the overthrown of the KMT that was exiled in Taiwan, and the founding of the People's Republic of China (PRC).

3.4. *International law from the establishment of the People's Republic of China to today.*

On 1 October 1949, Mao Zedong proclaimed the establishment of the People's Republic of China, became the chairman of the Communist Party of China (CPC) and ruled the country. A brand new system began. China rejected all the obligations deriving from the previous colonial supremacy and rebuilt its foreign relations on the Five Principles of Peaceful Coexistence, firstly declared in the Sino-Indian Agreement on Trade between Tibet and India in 1954[60].

These Five Principles of Peaceful Coexistence at the basis of the relations between the two countries were:

1 mutual respect for each other's territorial integrity and sovereignty;
2 mutual non-aggression;
3 mutual non-interference in each other's internal affairs;
4 equality and mutual benefit;
5 peaceful coexistence

[59] See Part II of this Chapter for a more extensive coverage of the situation

[60] Trade Agreement between the Republic of India and the People's Republic of China (14 October 1954) New Delhi.

Article 56 of the Common Programme of the Chinese People's Political Consultative Conference (1949), the founding proclamation of the PRC (1949)[61], and the Preamble of the first Constitution of the People's Republic of China (1954)[62] contained the principles of equality, mutual benefit and mutual respect for territorial sovereignty[63].

The five principles contain the major Confucian[64] and Mohist features.

China's strict devotion to the principle of sovereignty, tangled amid cultural tradition and the country recovery from the century of humiliation, is the country's distinctive feature of foreign policy.

The Five Principles of Peaceful Coexistence seem to have drawn upon the Preamble of the Charter of the United Nations in conveying tolerance and the idea of living "together in peace". Article 2 of the UN Charter demands the UN members to act in accordance with the principles of sovereignty, peace and territorial integrity[65].

The Bandung conference held in 1955 with twenty-one Asian and African countries was a key event for the furthering of the five principles in the global stage. At the end of the Conference, a *final communiqué* was issued containing a list of ten principles. The five principles of peaceful coexistence were fully represented and included in the Declaration on the Promotion of World Peace and Cooperation[66].

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61 01 October 1949, Proclamation of the Central People's Government of the People's Republic of China.

62 Preamble, Constitution of the People's Republic of China (1954).

63 Halsall, P. (1998) Modern History Sourcebook: The Common Program of the Chinese People's Political Consultative Conference, 1949.

64 Analects, Confucius: 己所不欲，勿施于人 (do not do to others what you would not wish them to do to you). Analects, Confucius, available at https://ctext.org/analects/zh?searchu=%E5%B7%B1%E6%89%80%E4%B8%8D%E6%AC%B2%EF%BC%8C%E5%8B%BF%E6%96%BD%E6%96%BC%E4%BA%BA. Accessed on 24 November 2021. See also The Analects of Confucius, accessed on 29 January 2022.

65 Article 2, Chapter 1, Charter of the United Nations

66 The ten principles of the Bandung Conference:

2 Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations,

3 Respect for the sovereignty and territorial integrity of all States.

4 Recognition of equality of all nations and of all States, big and small.

5 Abstention from interference or intervention in the internal affairs of other States.

6 Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations.

7 Abstention from the use of arrangements of collective defence to serve the particular interest of any of the big powers. Abstention from exerting pressure by any country on other countries.

8 Abstention from acts or threat of aggression or the use of force against the territorial integrity or political independence of any States.

9 Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' choice, in conformity with the Charter of the United Nations.

10 Promotion of mutual interests and co-operation.

The principles of peaceful coexistence are general principles of international law enshrined with special emphasis in most Chinese-published international law textbooks.[67]

In 2008, the Chinese prime minister Wen Jiabao reported at the UN GA 63rd session:

"The world needs peace, for only with peace can there be development. China earnestly hopes to have a peaceful international environment in order to achieve its development goals. The Chinese Government is committed to an independent foreign policy of peace and stands ready to work with other countries to advance the noble cause of peace and progress of mankind. Respect for sovereignty and non-interference in the internal affairs of other countries is the prerequisite for sound state-to-state relations. The Chinese people have learned from their modern history of humiliation that when a country loses sovereignty, its people lose dignity and status. China is firm in upholding its hard-won sovereignty and territorial integrity and will never tolerate any external interference. Following the principle of treating each other as equals, China also respects the sovereignty and territorial integrity of other countries as well as the independent choice of their people for social systems and development paths."[68]

China knows that the democratization of international relations comes also with good governance, promotion of human rights and rule of law, but it does not allow it at the expenses of state sovereignty and independence. Respect the free pursuit of state welfare and development should be at the core of international governance and democracy[69].

As Xue Hanqin tries to explain, the Chinese understanding of sovereignty entails the interplay of different political, social and cultural frameworks within the borders of a country that needs to be preserved from interference and external scrutiny in order for a status quo to survive[70]. Non-interference means that any state *should refrain from imposing* [its] *ideological and cultural preferences on other States*[71]. The existence of a supranational body that interfere in the internal affairs of a country regardless of whether the state has consented to it would run counter this attitude and would create a system of hierarchy made of impositions and power-imbalances. What China advocates for instead is an horizontal

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11 Respect for justice and international obligations.
Final Communiqué of the Asian-African conference of Bandung 24 April 1955

67 See Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020. p. 276.

68 Statement by Wen Jiabao (24 September 2008) China Committed to Reform and Opening-up and Peaceful Development; PRC Mission to the UN, *www.china-un.org › chn › premierwen_63rd_ga*

69 Xue, H. (2012), Chinese Contemporary Perspectives on International Law History (Culture and International Law, Volume 355). Collected Courses of the Hague Academy of International Law. Brill Reference Online. Accessed on 15 Feb. 2020. pp. 93-96

70 *Ibid.* Cit. p. 95

71 *Ibid.* p. 96

system based on equality and independence among nations that does not require nor fear any form of intrusion[72]

The People's Republic of China was recognised as the only legitimate representative of China to the United Nations in 1971 UNGA resolution 2758[73]. Since, Chinese foreign policy has developed around China's three main pillars: sovereignty, development and security.

The Ministry of Foreign Affairs of the PRC sent a communication in 1972 to the UN Secretary General to ensure the new position under multilateral treaties of the PRC and ROC:

"1) With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.
2) As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of `China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to"[74]

China considered treaties the major source of international law and customs as subsidiary sources of law. The idea that customary international norms are binding on States because a considerable number of States recognized them regardless of a state's precise position towards that custom, was criticized by China and regarded by it as a further indication of western hegemony.

After 1971 China remained sceptical and hostile to the UN and the western hegemony. It perceived the interpretation of international law by western powers to be imperialistic and bourgeois in nature. China was not excited at the idea of becoming subject of scrutiny by other states and supranational bodies. The PRC knew that the Chinese culture was different from that of western-made bodies, and the risk of scrutiny and interference could have been immediate[75].

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72 *Ibid.*

73 Restoration of the lawful rights of the People's Republic of China in the United Nations, Resolution 2758 (XXVI) (25 October 1971), 26th Session General Assembly, A/RES/2758(XXVI)

74 China, Multilateral Treaties Deposited with the Secretary General, United Nations Treaty Collection, available at https://treaties.un.org/Pages/HistoricalInfo.aspx#China accessed on 24 November 2021.

75 For instance, the importance that the Chinese culture attributes to the collectivity and the well-being of the community contrasts with the individual-centred approach common to western-led societies. This difference in particular stands at the core of one of the major clashes between the European and the Asian

In its first decade as member of the UN, China was frequently absent and never designated any candidate to the ICJ until 1984[76].

Things started to change once the ICJ sided with Nicaragua in the case Nicaragua v. The United States of America (1986). This for China represented a positive attitude impartial to the American western hegemonic power[77].

The first decades of the PRC were filled with strong criticism but also a degree of positive constructivism. Since the 1980s, however, China saw a shift and became an active participant in the international arena. It took part in the international making-process and became party to hundreds of multilateral treaties. China's international profile expanded mainly within intergovernmental organizations and financial institutions, including accession to the World Bank and the International Monetary Fund.

The increasing participation in the international arena led China to amend and adopt a wide array of domestic norms based on market economy and started to adapt international rules within the domestic system. International treaties under Chinese law have to be concluded in accordance with the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, also known as the Treaty Procedure Law, which was promulgated in 1990.

In 1997 and 1998 China signed the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both carrying strong influence on national reforms. Since then, China joined almost all the major intergovernmental organizations and became party to major conventions taking active part in the international law-making process. In the late 1990s, China also started to engage the activities of the Association of Southeast Asian Nations (ASEAN).

On 11 December 2001 China joined the WTO[78] and on the same year, signed the Treaty of Good Neighbourliness and Friendly Cooperation with Russia. By 2015 China met the UN Millennium Development Goals in terms of economic progress.

With the country growing image and power in the global stage, China has engaged in multilateralism and international frameworks taking up on the responsibilities that the status

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approach, particularly when it comes to the human rights discourse. See Feng, Y. (2010), *supra note 11,* p. 116-7 on this.

76 Chan, P. C. (2014), *supra note 41,* p. 886

77 Chan, P. W. (2015), *supra note 45. p.* 887

78 China and the WTO. World Trade Organization. Available at www.wto.org/english/thewto_e/countries_e/china_e.htm accessed on 11 February 2020.

of an international power entails. However, such a status also means visibility and further exposure to external scrutiny. Strong criticism has indeed weighed upon the country in relation to its reluctance to abide by certain international obligations.

4. The People's Republic of China: from its founding to modern times

4.1. *Evolution of a living constitution*

With the establishment of the PRC all the previous laws were abolished, and the Soviet model was transposed into the Chinese socio-legal reality. Any legal knowledge coming from the West was considered useless and rejected.

The People's Republic of China (PRC) under Mao's regime lasted for 30 years. The most remarkable features of the Chinese rapid transformation were "the Great Leap Forward" (1958-1960) and the Cultural Revolution aimed at reinvigorating China towards a new era. However, both led to losses, destruction and death leaving the Chinese population to strive in a lawless country.

With the death of Mao Zedong (1976) and the end of the cultural revolution Deng Xiaoping and the central leaders of the CPC decided to engage on a socio-economic development towards a new system based on socialist democracy[79]. National economic reforms began on the same year leading to a boom in legislations, laws, and regulations. The concepts of socialist market economy and the rule of law were introduced[80].

At the eleventh people's congress of the CPC in 1979, the country's legal reconstruction was launched. New bodies of law, including criminal law and procedure, started to be enacted by the National People's Congress (NPC)[81].

Similarly to the Soviets, the Chinese socialist system was organised into a sort of centralised democracy framed both in the Party and in the PRC constitutions. Defined as *democratic*

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79 See Wang, T. (1990), *supra note 1.* accessed online on 10 February 2020.

80 See Zhang, M. (2010), *supra note 3.* p. 13

81 The National People's Congress (NPC) is the highest state organ of power of the PRC. The NPC Standing Committee is its permanent organ. The NPC and its standing Committee exercise also legislative state powers. See the National People's Congress, available at http://www.npc.gov.cn/englishnpc/statestructure2019/201911/fa2deebf75264effa68df01cfecfb60c.shtml accessed on 24 November 2021. See also the Legislation Law of the People's Republic of China available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/11/content_1383554.htm accessed on 24 November 2021.

centralism it implied the interplay of democratic principles and central control. It allowed a degree of liberal freedom (i.e. free speech) within a centralised system that functioned through control and discipline.[82].

After a series of constitutions that started to be promulgated in 1949[83], the new and last constitution was issued in 1982 by the 5th National People's Congress (1978 – 1983). The 1982 constitution is the one in place also today. It went through several revisions (1988, 1993, 1999, 2004 and 2018). The 1999 and 2004 amendments showed significant progresses in terms of human rights protection. The 1999 amendment added the sentence "governing the country in accordance with the law", incorporating the principle of the rule of law in the Constitution, and the 2004 amendment adds "the State respects and protects human rights". The 2018 amendment, the latter one, was adopted at the 13th NPC and contains 21 articles (numbered 32 to 52) that carry important changes. The most relevant are the following ones: granting supervisory organs a constitutional status (article 37); including the concept of harmony in relation to socialist ethnic relations (Art. 38), foreign policy goals and principles of mutual benefit and peaceful development (和平发展道路; 互利共赢开放战略 Article 35) and the promotion of the creation of a community for the destiny of humanity (人类命运共同体, article 36). Article 36 introduces for the first time the phrase, "the CPC and its leadership" in the main body of the constitution (Article 36: 中国共产党领导是中国特色社会主义最本质的特征. *The defining feature of socialism with Chinese characteristics is the leadership of the Communist Party of China*) and adds in Article 39 the "Core Socialist Values" (社会主义核心价值观)[84]. Article 44 grants the NPC

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82 Article 3 of the Constitution of the PRC provides for the application of the principle of democratic centralism, democratic elections, for the creation of administrative, judicial and prosecutorial organs of the state by the people's congresses and the division of powers between the central and local state granting great autonomy to local authorities under the unified leadership of the central authorities. See Article 3, Constitution of the People's Republic of China (Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982).

83 The 1949 provisional constitution was replaced in 1954 with a Soviet-like constitution and in 1975 with the Gang of Four Constitution. In 1976 the Gang of Four fell, a followed a new constitution only in 1978, amended in 1979, and replaced again in 1982. Despite a constitution was in force, often many provisions were ignored in practice. (The gang of four was a political group of communist party officials, amongst who there was the wife of Mao Zedong. The gained importance during the cultural revolution and were later criminally charged of treason).

84 *Core Socialist Values* are National values: prosperity, democracy, civility, and harmony; social values: freedom, equality, justice, and rule of law; individual values: patriotism, dedication, integrity, and friendship. Wei, C & Hu, T. (2018) Annotated Translation: 2018 Amendment to the P.R.C. Constitution,

Standing Committee powers to oversee the State Supervision Commission, to remove its members and renames the NPC Law Committee in the "NPC Constitution and Law Committee" giving the NPC authority over constitutional interpretation and review. Article 45 abolishes the term-limits on the Presidency and Vice Presidency (中华人民共和国主席、副主席每届任期同全国人民代表大会每届任期相同- *The term of office of the President and Vice President of the People's Republic of China is the same as that of the National People's Congress.*) that had been written and never changed since the 1982 Constitution[85].

4.2. *Criminal law and domestic judicial bodies*

In 1905 the *five punishments* of the Confucian legal tradition codified in the old Qing code was abolished and the first modern codes of criminal law and criminal procedure, namely the *New Criminal Law of the Great Qing* and a *Draft of a Procedural Law for Criminal Matters of the Great Qing,*[86] were adopted. The draft of the criminal procedure code was later complemented with the formulation of the Daliyuan (大理院)[87], Chinese supreme-like court. The new criminal code abolished the principle of collective criminal responsibility and reduced punishments to three main sentences: fines, imprisonment and death penalty. Imprisonment was the most common form and death penalty was to be carried out in isolation through strangulations and shooting[88]. In the final years of the Qing Empire, a prison law was also drafted[89].

The Beiyang Government (1912 – 1928) absorbed the late Qing codes and developed through them.[90] With the KMT two Criminal Procedure Codes (中华民国刑事诉讼条例) were created[91]. All the new criminal codes provided for individual mitigation and gave judges wide scope of discretion[92].

NPC Observer available at https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/ accessed on 24 November 2021.

85 *Ibid.*

86 See also Mühlhahn, K. (2009), *supra note 10,* p. 61.

87 The Daliyuan 大理院 was the organ parallel to the modern supreme court at the age of the Qing Dynasty.

88 See also Mühlhahn, K. (2009), *supra note 10,* p. 61.

89 *Ibid.*

90 *Ibid.*

91 Pei, W. (2016). Harmony, Law and Criminal Reconciliation in China: A Historical Perspective. Erasmus L. Rev., 9, 18. p. 21

92 *Ibid. pp.* 18, 23, 29.

The situation changed with the establishment of the PRC in 1949 and the abolishment of all the previous legal tradition.

The founding of the PRC comes at a time when the world was divided into two major blocs. China was aligned with the socialist bloc headed by the Soviet Union that embraced Marx's theories of class struggle on which the legal-political programme of the country was built.[93] For the first 30 years of the PRC, codes of criminal law and procedure were absent. The criminal process was mainly based on leniency for confession *tanbai congkuan* 坦白从宽, severe punishment for those who opposed or refused to confess *kangju congyan* 抗拒从严, and secret interrogations to exclude any chance of defence for alleged criminals[94]. The justice system was framed on an *iron triangle* - judiciary, procuracy, police – vested with wide discretionary powers[95].

The 1979 criminal code, with 192 articles, set the foundational framework of an inquisitorial system of criminal justice based on both civil and Soviet law traditions. Yet, many procedural provisions remained at the hands of the *iron triangle* and were based on the follow up of the events of the cultural revolution. Article 2 of the 1979 Criminal Code for instance stressed on the principle of legality and started to change the understanding of criminal law and procedure not just as a tool to punish but also an instrument for protection and security[96]. The criminal codes were the main sources of criminal law and procedure. Other sources of law were the NPC-adopted statutes, judicial decisions by the supreme people's court or procuracy, local legislatures such as the 1979 Organic Law of the People's Court, the Organic Law of People's Procuracies, Regulations on the arrest and detention of persons accused of

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93 Xue, H. (2012), *supra note 69.* .

94 Liu, S., & Halliday, T. (2009). Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law. (Law & Social Inquiry, 34(4)), p. 921 – 922.

95 Cheng, Y. (1988). Criminal Procedure in China: Some Comparisons with the English System.(International and Comparative Law Quarterly, 37(1)) p. 192

96 Liu, S., & Halliday, T. (2009), *supra note 94*, p. 922. Article 2, Criminal Law of the People's Republic of China, "The tasks of the PRC Criminal Law are to use punishment struggle against all criminal acts to defend national security, the political power of the people's democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the labouring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction". (Chinese text: 第二条 任务) 中华人民共和国刑法的任务，是用刑罚同一切犯罪行为作斗争，以保卫国家安全，保卫人民民主专政的政权和社会主义制度，保护国有财产和劳动群众集体所有的财产，保护公民私人所有的财产，保护公民的人身权利、民主权利和其他权利，维护社会秩序、经济秩序，保障社会主义建设事业的顺利进行). Article 2 remains the same as it is today.

crimes and the 1983 decision on speedy trial for threats to public security.[97] The doctrine of the precedent was (and is) not applicable.

In 1983, the NPC Standing Committee (NPCSC) promulgated the "September 2 Decision" that abolished *de facto* right to legal counsel of the defendant sentenced to death. This increasing harshening in criminal procedures began with the *yanda* campaign (严打1979-1989), also known as the Strike Hard campaign, that saw the 1979 CPL procedures replaced by the principle of "severe and swift" (*congzhong congkuai* 从重从快) and the increasing arbitrary power of the iron triangle. The *yanda* campaign is considered the major anti-crime campaign of that time and became the standard response to crimes in the PRC that indeed led to two further *yanda* campaigns in 1990 and 1996[98].

In those years international influences, mainly Anglo-American ones[99], had an impact on the development of Chinese criminal law[100]. The diffusion of global norms of criminal justice coincided with China's great transformation from a socialist society to a market-oriented modern society[101] yet always maintaining the so-called "Chinese characteristics". Social conditions, inequalities, unfair trial, the stress on substantive law more than procedure, the institutionalized power of the police, the procuracy – supervisory body – and the struggle for the lack of criminal defence are all part of the system. Article 8 of the Legislation Law of the People's Republic of China states that only national laws passed by the NPC have the authority to criminalise behaviours.

Since the first promulgation of the framework of the current criminal legal system on 1 July 1979, and amended in 1997, the criminal law was subsequently amended by the NPC Standing Committee nine times: in 1999, August and December 2001, 2002, 2005, 2006, 2009, 2011, and 2015.

China has been under strong international criticism for the severity of its criminal law system and the persistent use of capital punishment on an array of crimes[102].

The main criminal justice discourse that the party-state implements is based on 宽严相济 *kuanyan xiangji,* meaning the balance between leniency and severity believed to the effective

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97 1st Organic Law (1954) is a source of criminal procedure.

98 See Trevaskes, S. (2007). Severe and swift justice in China. (British Journal of Criminology, 47(1)). 23-25.

99 Liu, S., & Halliday, T. (2009), *supra note 94*, p. 25

100 *Ibid.* p. 922.

101 *Ibid*.

102 Xue, H., & Wilmshurst, E. (2014). China and international law: 60 years in review. Chatham House. p. 6

response to preserve a harmonious society within a fast-paced changing environment. This has its origins in the imperial world, which as seen early, functioned through a scheme of leniency and punishment.

To better comply with international standards the 2011 revision introduced the standardization of sentencing[103], community correction, improvements to the leniency system for special groups (juvenile and elderly), and removed thirteen non-violent offences from the list of crimes amounting to death penalty.[104]

The most common punishments are public surveillance, criminal detention, fixed-term imprisonment, life imprisonment and death penalty[105]. Supplementary punishments are fines, deprivation of political rights and confiscation of property.

Amongst a wide array of other crimes under the Criminal Code of the PRC, endangering national and public security and disrupting order in various areas (i.e. socialist market economy, financial administration, public order) are considered grave offences.

The criminal justice system recognises the principle *nullum crimen sine poena sine lege,* as provided in Article 3 of the Criminal Law of the People's Republic of China.

Progresses have been made also in relation to the principle of proportionality between punishment and liability, the principle of equality before criminal law, and protection for the alleged criminals.[106]

Characteristic feature of the judicial system in China is the concept of "judicial interpretation of code provisions", *sifa jieshi* 司法解释, by the Supreme People's Court (SPC). Such power of statutory interpretation allows the SPC to gain a semi-legislative power through extensive binding judicial interpretation that makes it a source of law known as "secondary law".

As Keith, R. C., & Lin, Z. (2009) explain, in a fast-paced development and reform context as that of China, expedient judicial account comes at the forefront. "To avoid potential legal system failure, the Supreme People's Court has been devising newly improvised formats of judicial interpretation that are supposed to plug the holes in the system while it awaits future legislative developments"[107].

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103 Xue, H. (2012), *supra note 69,* p. 137

104 Xue, H., & Wilmshurst, E. (2014), *supra note 102,* pp. 6; 138

105 Article 33, Criminal Law of the People's Republic of China.

106 Xue, H. (2012), *supra note 69,* p. 137 - 138

107 Keith, R. C., & Lin, Z. (2009). Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal Law. (China Information, 23(2)) Sage Journal, p. 225

The role of the courts in the Chinese system is also very different from that of the western tradition. Judges do not have to be independent voices but have to comply with state policies. The socialist influence on criminal procedures is very significant. As Bo Yin and Peter Duff observed, "[i]n socialist law, criminal procedure is the process used by the agencies working on behalf of the governing class to legitimise and implement punishment in order to maintain order". This approach is confirmed in article 2 of the Chinese criminal code and article 1 and 2 of the code of criminal procedure. This proves how the legal system is normally instrumentalised for ideological purposes[108].

Only after the CPC has approved draft laws, they can be submitted to the legislative body for review. It may also happen that when a process needs to be expedite, the CPC overrules formal legislation.[109]

The socialist ideology still drives legislations and legal practices in modern China in every area of the law. One can parallel it to *Li* in traditional China. The use of the word "people" in all the institutional justice agencies has been a distinctive characteristic of the Chinese socialist legal system[110].

4.2.1. International echo of a domestic criminal system

This paragraph will be more of an introductory paragraph to the next part of the chapter.

China ratified all the four Geneva conventions (1949), the two additional protocols (1977) and the Genocide Convention[111]. Yet, China is not a party to the Rome Statute. Questions of sovereignty, automatic jurisdiction, and the role of the Security Council are major concerns that navigate around such a decision.

How Chinese criminal law operates today? Does Chinese domestic provisions allow for prosecution of international crimes?

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[108] Yin, B., & Duff, P. (2010). Criminal procedure in contemporary China: Socialist, civilian or traditional? International & Comparative Law Quarterly, 59(4), p. 1103 -1104. Cit. "In Marxist doctrine, law is not a self-contained objective system but, like politics, is only a collection of norms which serve the interests of the ruling class" Ibid. p. 1103.

[109] *Ibid.* pp. 1107-1108

[110] *Ibid.*

[111] Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 A(III), 9 December 1948.

Responses to these questions have to be understood taking into account that the Chinese culture tends to look at the common interest of the people over that of the single as the best approach to foster social order and stability for the maintenance of an harmonious society.
The same is true in the country approach to law, order and public duty. Regardless of the changing of the form that the Chinese order may undertake, mainly considering the various transitions from traditional to communist and to a *profit-making* systems - part of the so-called socialist market economy with Chinese characteristics – the Chinese focus that is reflected in the country normative framework, remains on the prioritisation of the interests of the collectivity, whether it comes or not at the expenses of the single individual.
Article 2 of the Criminal Law of the People's Republic of China (1997) contends that the PRC criminal system is tasked with "punishing the struggle against criminal acts, defend national security, the socialist system. and to maintain social and economic order"[112]. Within the meaning of article 13 of the criminal law of the PRC, a crime is an act that endangers the sovereignty, territorial integrity and security of the State[113] and, as for article 14, it is committed with *clear knowledge* that it will result in *socially dangerous consequences*[114].
Article 28 of the Constitution of the People's Republic of China provides that "the state shall maintain public order, suppress treason and other criminal activities that jeopardize national security, punish criminal activities, including those that endanger public security or harm the socialist economy, and punish and reform criminals"[115].
Chinese criminal law lacks various elements in order to trigger liability for international crimes and mass atrocities committed by Chinese nationals or in Chinese territory. For instance, part II of the criminal law of the PRC contains special provisions on national security and offences against persons' and citizens' rights but it lacks the chapeau element that provides specific intent reference to the gravity threshold[116]. The only modern trial

[112] Article 2, Criminal Law of the People's Republic of China, Adopted by the Second Session of the Fifth National People's Congress (1 July 1979) and amended by the Fifth Session of the Eighth National People's Congress (14 March 1997)
[113] Article 13, Criminal Law of the People's Republic of China, Adopted by the Second Session of the Fifth National People's Congress (1 July 1979) and amended by the Fifth Session of the Eighth National People's Congress (14 March 1997)
[114] Article 14, Criminal Law of the People's Republic of China, Adopted by the Second Session of the Fifth National People's Congress on (1 July 1979) and amended by the Fifth Session of the Eighth National People's Congress (14 March 1997)
[115] Article 28, Constitution of the People's Republic of China, Constitution of 1982, amendment to the Constitution of the People's Republic of China adopted at the First Session of the Thirteenth National People's Congress (11 March 2018)
[116] See O'Brien, M. (2016) "Revolution is glorious! Revolution is no crime!" International Crimes and Chinese Domestic Law, and the Gang of Four Trial (New Criminal Law Review 19.3) pp. 319 – 331.

relevant for international criminal law was that of the Gang of Four[117] that involved mass atrocities and leaders liability. However, it is considered to be more of a show trial[118] and stemmed from political interests and political offences. Leaders such as Mao Zedong and Zhou Enlai were waived from any liability. The four defendants were eventually charged with a series of offences including treason, plotting to usurp state power and power seizure among many others[119].

Despite forty years have passed since the trial of the four leaders, no progress on appropriate legislations to prosecute international crimes occurred and no express provisions exist to prosecute war crimes, crimes against humanity, genocide.

However, certain provisions of the Chinese constitution show concerns in relation to the crime of aggression, which is regarded as a serious challenge to national security.

The preamble of China's Constitution provides,

"China adheres to an independent foreign policy, adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence, adheres to a path of peaceful development, and adheres to a mutually beneficial strategy of opening up in developing diplomatic relations and economic and cultural exchanges with other countries and in working to build a community with a shared future for mankind ... and strives to safeguard world peace and promote the cause of human progress"[120].

Article 29 and Article 55 of the Constitution establish the duty of armed forces of the PRC and of its citizens to resist aggression. Article 103 of the PRC criminal law distinguishes between *ringleaders* and other *participants.* Article 13 seen above and Chapter I and II of Part II (special provisions) of the Criminal Law of the PRC integrate these provisions by defining the crimes that reflect strong concerns with state protection and national security.

Article 9 of the 1997 amended Criminal Law includes also a provision to enable prosecution and punishment for international recognized crimes. It reads: "this law is applicable to the crimes specified in international treaties to which the PRC is a signatory state or with which

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117 The Gang of Four was a political group under Mao Zedong made of four Chinese official of the CPC (including Mao's wife). They were blamed for the excesses of the cultural revolution and tried for the atrocities that took place in those years. The cultural revolution started as an anti-capitalist movement ad transformed into violent mass persecutions against those who did not fit Maoist standards (from teachers to high-ranking officials, religious figures etc.)

118 See O'Brien, M. (2016), *supra note 116,* p. 331

119 For an extensive account of the trial of the gang of four, see O'Brien, M. (2016), *supra note 116,* pp 331 – 340

120 Operative paragraph 12, Preamble, Constitution of the People's Republic of China (2018)

it is a member and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations"[121].

5. Conclusion

The history of a country tells the story of choices, patterns, and transformations that the country has made. It tells the story of how the country became what it currently is and conceals the reasons of what it currently does. As P. R. Goldin wrote, "certain long-term continuities of Chinese law are striking".[122]

In this research, insights to Chinese culture and history are essential to carry out the country-specific analysis. It shapes those lenses through which a state behaviour should be looked at in the development of international norms. This comes true even more in the case of a country like China that, despite is a country in continuous development and transformation, holds an historical legal tradition that dates back to 3000 years ago and it is soaked in people's attitudes and beliefs influential also today.

This historical journey explains why the concept of sovereignty is at the heart of the Chinese international legal discourse and foreign policy. It seeks to qualify to which degree understandings of peace, security and justice are part of it.

With China's rise as one of the biggest actors in international order today, it is fundamental to understand how international law has influenced the Chinese attitude before being able to grasp what stands behind the country's behaviour in relation to international justice, peace, and security.

[121] Criminal Law of the People's Republic of China (1997)

[122] Cit. Goldin, P. R. (2012). Han Law and the Regulation of Interpersonal Relations:" The Confucianization of the Law" Revisited. Asia Major. p. 1

CHAPTER III

Part Two

Walking on that thin line between maintenance of peace and justice. China in the evolution of the crime of aggression

1. Introduction

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1. Introduction

Initially guided by the Nationalist government[1] and later by the PRC, China has engaged in the development of international criminal justice and in the evolution of the crime of aggression since its early times. Actively present in the international efforts triggered by the two world wars that resulted in the establishment of the International Military Tribunals and the United Nations, China has since regularly engaged in the establishment of international criminal courts and tribunals and participated in the wide array of negotiation processes until the Conference in Rome in 1998. Since 2002 China has consistently participated at the sessions of the Assembly of State Parties as observer state and was present at the Review Conference for the crime of aggression in Kampala in 2010 despite inability to cast its vote. On these premises, this part of the Chapter wants to draw on the main instances of the Chinese engagement at the various processes of the development of international criminal law and in the concurrent evolution of the crime of aggression. In order to do so, the main stages of its evolution will be chronologically framed. It will attempt to be consistent with the same structure of the previous chapters and look first at the Chinese engagement with international criminal tribunals and continue with the substantive development of the crime of aggression. It will follow a similar chronological analysis with a pick-and-chose approach to those instances in which China held a relevant role in the development of the crime, supported by Chinese arguments and concerns. This part of the research will try to trace the Chinese historical engagement in the developing process of international criminal law and more specifically of the crime of aggression. It will therefore start by giving an account of the country presence in the efforts that conveyed in London and San Francisco between the

[1] In the 1920s China was divided into military factions and temporary governments representing China (such as the Beiyang government in Beijing (1912 – 1928) that controlled a small portion of northern China and the KMT in Guangzhou that controlled the southern part until unified the country under one single government in Nanjing). This had an impact on the country presence at the international forums and on a coherent foreign policy. This is why it was so important for China to join the 1919 Paris Peace Conference.

post WWI to post WWII. It will then touch upon the events of the Tribunal in Tokyo, the subsequent efforts towards the establishment of the International Criminal Court and the negotiating process that concluded with the Kampala Review Conference and the adoption of the amendments on the crime of aggression.

2 The Chinese early response to atrocities: pursuing peace and security in a new world order

2.1 *From Paris ...*

The closing stage of the first world war brought China gradually out of a closed shell in an effort to leave behind scepticism against western imperialism and to open to western-dominated international norms. This new attitude of exposure concealed the primary intention of the Chinese leadership to embrace the new system as tool that could serve to preserve national sovereignty and territorial integrity from further intrusions[2]. At the Paris Peace Conference in 1919, the League of Nations was created, and the Republic of China (ROC) joined as one of the founding members. China joined eager to promote international justice and in the hope that international participation could improve its global position[3]. In those years China was stuck in a condition of unequal treaties imposed by western imperialist powers. To reach a degree of international power parity, cooperation with the League of Nations was essential[4]. However, this left no choice but to abide by the general attitude of

[2] The historical events outlined in the previous section of the chapter, show how China saw western international law as a colonialist and imperialist tool for oppression and exploitation. China refused to sign the treaty of Versailles because of the injustices that raised out of the Shandong problem.

[3] Kaufman, A. A. (2014) In Pursuit of Equality and Respect: China's Diplomacy and the League of Nations (Modern China, Vol. 40, No. 6). Sage Publications. p. 606

[4] Sun Yat-sen invoked multiple times the provisions of the League Covenant to regain the territorial sovereignty and integrity lost with the XIX century unequal treaties. In 1925 and 1929 Article 191 was invoked for a reconsideration of the country treaties-status in application of the principle *rebus sic stanctibus*. Article 19 of the Covenant of the League of Nations: "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world". See also Article 62 of the Covenant of the League of Nations. For a comprehensive insight on the Chinese relations with the League of Nations see Goto-Shibata, H. (2017) The League of Nations as an actor in East Asia: empires and technical cooperation with China (International Relations of the Asia-Pacific, Volume 17, Issue 3,). Oxford University Press. pp. 435–461

the changing international order focused on the promotion of world peace and security[5].The 1920s witnessed the flourishing of a wide variety of multilateral treaties. In this context, China participated at the various efforts and negotiations and became a signing nation of significant agreements amongst which the Nine-Power Pact[6], the Draft Treaty of Mutual Assistance[7] and the Kellogg-Briand Pact[8]. China also became a member of the Preparatory Commission for the Disarmament Conference and of the Committee on Arbitration and Security in Preparation for the Conference for the Reduction and Limitation of Armaments in support of the efforts to outlaw war and promote the peaceful settlement of disputes[9]. The Kuomintang (KMT, Chinese Nationalist Party) sent a Chinese delegation to every meeting of the League from its founding to its dissolution (1946). This was functional to gain visibility as central authority in internal political struggles. In 1928 the nationalist party led by Chiang Kai-Shek (蔣介石) took over the previous government in Beijing and became the only legitimate one. Domestic turmoil paused, at least temporarily.

The KMT was keen to choose representatives that lived up to the standards of the League of Nations. The delegation was formed by a small group of "well-educated westernized men"[10]. Mr Wellington Koo (顧維鈞)[11] is still considered today the most famous Chinese diplomat

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5 See for instance the response the Chinese Government gave to the Council and the Commission of the League on the treaty of mutual assistance in August 1924. China accepted the text of the treaty because it was drafted to calculate the promotion of universal peace and reduction of armaments. See Reply from the Chinese Government, Treaty of Mutual Assistance (Replies from Governments, Document 3(a), Annex 3 p. 150) in Ferencz, B. B. (1975) *Defining International Aggression*. The Search for World Peace. A Documentary History and Analysis. (Vol. I) New York: Oceana Publications. p. 105

6 The Nine-Power Treaty demanded "to respect the sovereignty, independence, territorial and administrative integrity of China and prohibited war in violation of international treaties". See 1922 Treaty Between the United of States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal in Papers Relating to the Foreign Relations of the United States, Department of State Publication 2033, available at https://avalon.law.yale.edu/20th_century/tr22-01.asp#1 accessed on 16 November 2021.

7 See Mr Tang's Letter, in Letter from the Chinese Government to the Secretary General of 1 August 1924 regarding the Draft Statute of Mutual Assistance, C.375, N.137.1924.IX C.T.A. 447. Available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-375-M-137-1924-IX_EN.pdf accessed on 16 November 2021.

8 See Adhering Countries, in Kellogg-Briand Pact 1928 (United Stated Statutes at Large, Vol. 46 Part 2 p. 2343) available at https://avalon.law.yale.edu/20th_century/kbpact.asp accessed on 16 November 2016.

9 Documents of the Preparatory Commission for the Disarmament Conference, League of Nations (1928) available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-667-M-225-1927-IX_EN.pdf accessed on 16 November 2021.

10 Kaufman, A.A. (2014), *supra note 3*, p. 611

11 Mr Koo was a leading diplomat from Beijing before the KMT. With the regime change he moved to Manchuria, where the first explicit case of aggression at hands of Japan took place. The loss of Manchuria strong feelings in Koo resulting in persistent efforts to recognise aggression as a crime. Wang, D. (2005) China's unequal treaties: narrating national history (Lexington books) Lanham, Md. p. 40

of the early twentieth century together with Victor Hoo (胡世澤). They had been the drafting members of the League's Covenant and China's chief representatives in the 1920s-30s[12]. The same figures represented China at the post-WWII negotiations in London and Washington, at the sessions of the Permanent Court of International Justice (1922 -1946) and at the meetings at Dumbarton Oaks and in San Francisco (1944).[13] In 1931, following the Mukden incident and the subsequent invasion of Manchuria[14] the ROC resorted to Article 11 of the Covenant and submitted the dispute to the League[15]. This triggered the US reaction that urged for the enforcement of the Kellogg-Briand Pact and identified the actions of the Japanese as *premeditated acts of aggression*[16]. The Stimson Doctrine followed as policy of non-recognition of Japanese territorial sovereignty over Manchuria as a consequence of aggression[17]. On 7 July 1937 Japan ordered a large-scale attack. The Marco Polo Bridge Incident broke out near Bejiing and set off an intense war between China and Japan. Within a few months the Japanese army sized Nanjing and in December of the same year the Nanjing massacre took place over a period of six weeks. China resorted to the Nine-Power Pact and called upon its signatories to respond[18]. Complaints by the Chinese were brought before the Far Eastern Legal Committee of the League of Nations[19] that condemned the Japanese actions as violations of both the Nine-Power Pact and of the Kellogg-Briand Pact. Responses were weak and the Pact did not have enforcement mechanisms. The Kellogg-Briand Pact

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12 Kaufman, A.A. (2014), *supra note 3,* p. 622

13 *Ibid.* For an extensive account on Wellington Koo see Clements, J. (2008) *Wellington Koo: China* (Makers of the Modern World) London: Haus Publishing. See also Koo, V. K. W. (1888-1985), V. K. Wellington Koo papers, 1906-1992 bulk 1931-1966 available at https://findingaids.library.columbia.edu/ead/nnc-rb/ldpd_4078997 accessed on 16 November 2021.

14 The Mukden incident refers to the explosion of a railway track near the city of Mukden, in Manchuria. For a more extensive elaboration on the Mukden Incident see Ferrell, R. H. (1955) The Mukden incident: September 18-19, 1931, The Journal of modern history Vol. 27 No.1. The University of Chicago Press.

15 Article 11, Covenant of the League of Nations "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations" available at https://avalon.law.yale.edu/20th_century/leagcov.asp accessed on 16 November 2021

16 See Japanese Conquest of Manchuria 1931 – 1932, in Peace and war: United States foreign policy, 1931-1941 (1943) (United States. Department of State) US Government Printing Office. p. 4

17 *Ibid.* See also, The Mukden Incident of 1931 and the Stimson Doctrine (Office of the Historian, U.S. Department of State) available at https://history.state.gov/milestones/1921-1936/mukden-incident accessed on 16 November 2021

18 Boister, N & Cryer, R (eds.) (2008) The Tokyo International Military Tribunal: A Reappraisal. Oxford University Press. p. 13 – 14

19 Communication from the Chinese Delegation to the Secretary General, League of Nations, Geneva (1939). Available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-166-97-1939-VII_EN.pdf accessed on 16 November 2021.

had more the effect of a non-binding declaration than a peace instrument of enforcement[20]. It served as a basis for the creation of the post-war military tribunals. However, the status as victims of the Japanese aggression that the Chinese held and their alignment with the Allied powers, favoured China to formally join the Allies in the fight against Axis powers in December 1941. China became therefore an active participant in the establishment of the United Nations and the drafting of the London Charter.

2.2. *... to San Francisco*

Between August and October 1944 representatives of Great Britain, the United Stated, the USSR and China converged at Dumbarton Oaks in Washington DC for a conference aimed at setting the foundations for the establishment of the United Nations.[21] Precursor of the conference in San Francisco, the Dumbarton Oaks Conference marked the first important step for the creation of a post-war international organisation to succeed the League[22]. The outcome of the Conference in Washington was later refined in Yalta and finally framed into the Charter of the United Nations in San Francisco. As Kaufman notices, notwithstanding internal[23] and international[24] changes that the ROC went through in those years, the Chinese in Dumbarton Oaks showed an attitude of persistent commitment towards international law

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20 The Kellogg-Briand Pact, 1928 (Office of the Historian, U.S. Department of State) available at https://history.state.gov/milestones/1921-1936/kellogg accessed on 4 November 2021.

21 Preparatory Years: UN Charter History, History of The United Nations, un.org available at https://www.un.org/en/sections/history/history-united-nations/index.html accessed on 18 January 2021.

22 Before the Dumbarton Oaks the Allies could express their views on peaceful transition through statements and agreements. The Atlantic Charter was a pivotal policy statement for peaceful transition in the post-war discussed between Roosevelt and Churchill. It was aimed at cooperation between the two powers for the sake of international peace and security. Roosevelt, Churchill, Litvinov (USSR) and Soong (China), later joined by other twenty-two countries, signed the Declaration by the United Nations on 1 January 1942. These early steps introduced the Allies to multilateral cooperation to fight the Axis and re-establish and maintain international peace and security, prosperity and social stability. It was this kind of groundwork that allowed the establishment of the United Nations. See United Nations (2020) Why it Matters (75 Milestones in International Cooperation, vol. I) New York: Dag Hammarskjöld Library Section United Nations. See also 1941: The Atlantic Charter, History of the United Nations, unsecretariat.net, available at https://www.unsecretariat.net/sections/history-united-nations-charter/1941-atlantic-charter/index.html accessed on 16 November 2021. See also History of the United Nations, Model United Nations, available at https://www.un.org/zh/node/44721 accessed on 16 November 2021.

23 The civil war between the KMT and the CCP lied slightly more dormant in those years.

24 With WWII China's international position changed drastically. By the end of the war China was recognised as a major international power. Roosevelt included China to the "Big Four" and China became a key member of the UN and permanent member at the Security Council. Kaufman, A. A. (2014) *supra note 3*, p. 268.

and international institutions consistent with its attitude at the League[25]. At the meetings in Dumbarton Oaks, Wellington Koo and Victor Hoo, chief members of the Chinese delegation, presented seven proposals[26] and raised a series of issues during the negotiations in San Francisco.[27] China demonstrated in that occasion to strongly believe in the power of international law and international institutions, and on the peaceful settlement of disputes in accordance with the rule of international law[28]. This emphasis that China put on the rule of international law and that attributed to socioeconomic issues more than on security, was seen with reluctance and criticized mainly by the Americans.[29] Mr Hoo's scepticism on the unlimited veto power proposed by the Union of Soviet Socialist Republics (USSR), and Mr Koo's concerns over the permanent member's privileges of being freed from any rule creating a power hierarchy with smaller nations, reflected this attitude.[30] The initial proposals of the Chinese delegation fostered the idea of codification mechanisms by the General Assembly and suggested to refer to the existing law to facilitate its enforcement and to prevent it from being an instrument of power politics.[31] Another proposal advanced the idea of compulsory jurisdiction for the new world court and for the establishment of an entity to promote cultural cooperation for conflict prevention. Koo also recommended to define aggression that, even if not in a comprehensive manner, would have been functional for enforcement guidance.[32] Already at that time, there were several delegations advising that aggression should have been defined. However, they were all rejected because a definition of aggression seemed already a near-impossible challenge and it was considered beyond the scope of the Charter. Besides the proposals advanced by Mr Koo and Mr Hoo, the Chinese delegation supported the Security Council related proposal granting the Council power to "determine the existence of any threat to the peace, breach of the peace or acts of aggression"

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25 Kaufman, A. A. (2014) *supra note 3*, p. 628

26 See Chinese Proposals, Yearbook of the United Nations, Origin and Evolution (1946-47) p. 12 available at https://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf accessed on 16 November 2021. See Glassner, M. I. (ed) (1998) The United Nations at Work. (Westport, Conn.: Praeger,) Greenwood Publishing Group, p. 162. See also See Hilderbrand, R. C. (2001). Dumbarton Oaks: The origins of the United Nations and the search for post-war security. Chapel Hill: University of North Carolina Press. pp. 237 -240

27 Hilderbrand, R. C. (2001), *supra note 26,* p. 244

28 Kaufman, A. A. (2014), *supra note 3*, p. 628

29 See Hilderbrand, R. C. (2001), *supra note 26,* p. 231

30 *Ibid*. p. 231

31 Ibid. pp. 237 – 238. Kaufman, A. A. (2014), supra *note 3,* p. 628.

32 Hilderbrand, R. C. (2001), *supra note 26,* pp. 239-240. For an extensive analysis of the Chinese intervention and contribution at Dumbarton Oaks, See Hilderbrand, R. C. (2001), *supra note 26,* 229 – 244.

and to "make recommendations or decide upon the measures to be taken to maintain or restore peace and security"[33]. Related, the Chinese delegation introduced a paragraph that became article 40 of the UN Charter. The provision gives the Security Council power to call upon the parties to the dispute to carry out the "provisional measures" necessary to avoid the aggravation of a situation.[34] The Chinese proposals at Dumbarton Oaks were of great contribution to the work of the San Francisco Conference. Three of the Chinese proposals were included in article 1, article 2 and article 13 of the Charter and others were transversely influential.[35] In San Francisco, the chief of the Chinese delegation was Mr Soong. The delegation was divided in the various factions existing in China including the KMT, the CCP, and other parties. During the conference, the Chinese delegation maintained the same attitude that it held at Dumbarton Oaks, advocated for justice and equity, and contributed to the successful accomplishment of the conference. The Chinese delegation proposed the establishment of a new trusteeship system and added in relation to the concept of aggression that "provisions of support to armed groups, formed within [a state's] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection".[36] The Charter of the United Nations was adopted on 26 June 1945 at the Plenary meeting in San Francisco. It entered into force upon ratification of the ROC, the US, the UK and the URSS on 24 October 1945.

2.3. *... and, on the way to Tokyo. Establishing the International Military Tribunal for the Far East*

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33 Enforcement Arrangements, in Origin and Evolution 1946-47, Yearbook of the United Nations, p. 26. Available at https://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf accessed on 16 November 2021

34 *Ibid*.

35 Some of the Chinese proposals were later also part of articles 43(1), 55 and 76. See Glassner, M. I. (1998), *supra note 26,* pp. 161- 164 for further insights on the Chinese proposals that contributed to the final version of the United Nations Charter.

36 Franck, T.M. (2001) Terrorism and the Right of Self-defense. (American Journal of International Law 95.4) Cambridge, 839-843 p. 841 citing Tentative Chinese Proposals for a General International Organization (Aug. 23, 1944), 1944, Foreign Relations of the United States, 718, 725. Reference to the trusteeship system available also in Q&A: How did China participate in the founding of the United Nations?, Chinadaily.com.cn (2015) at https://www.chinadaily.com.cn/world/2015victoryanniv/2015-11/19/content_22485685.htm accessed on 16 November 2021. See also Petty, K.A. (2009) Criminalizing force: resolving the threshold question for the crime of aggression in the context of modern conflict (Seattle UL Rev. 33) Heinonline, p. 138.

While victors' nations were working in San Francisco, efforts to prepare the trials of war criminals started to take place in Europe.

The 1928 Peace Pact was an instrument to outlaw war and despite it did not criminalize aggressive war, it was a key tool on the way to its criminalisation.[37] In the early 1940s a series of discussions and engagements to prosecute war criminals before international courts started to take place.[38] Expert committees, new political commissions, allied powers, and representatives of interested governments gathered to negotiate how to make it happen. China was consistently present in the various efforts and became more active and visible from 1942. On 13 January 1942 at the signing of the Saint James Declaration China raised its voice and called for the prosecution of Japanese aggressors. The Chinese delegate, Mr Wunsz King（金问泗) representing a country victim of Japanese atrocities, asked to have the same conditions applied to the far-eastern war leaders, including Japanese authorities, responsible for the war[39]. Following the Chinese requests at Saint James' Palace on 1 December 1943 the US, China, and the UK adopted the Cairo declaration directed at punishing the aggression of Japan[40]. In the meantime, the UNWCC was set up on 20 October 1943 in London to investigate war crimes and to study questions for the establishment of an international court to try Axis war criminals[41]. Despite the Commission was at first dealing only with the European theatre, the Chinese representative, Wellington Koo, who was

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37 Lauterpacht claimed that the pact could serve to prosecute axis leaders responsible for waging war. According to his argument the planned violations of the Kellogg-Briand pact, would create individual criminal liability for waging war. Hathaway, O., & Shapiro, S. (2017). The internationalists: and their plan to outlaw war. UK: Penguin.

38 Hathaway, O., & Shapiro, S. (2017), supra note 37, gives an extensive account of H. Lauterpacht efforts towards the criminalisation of war crimes and acts of aggression

39 See Letter from the Chinese Minister to the Netherlands Government and Chargé d'Affaires to the Belgian and Czechoslovak Government, Mr. Wunsz King, (Chinese Legation London) (1942), in Punishment for war crimes: the inter-allied declaration signed at St. James's Palace (London 13 January 1942) and relative documents. pp. 15 – 16 available at https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522082 accessed on 16 November 2021.

40 The Cairo Communiqué, 1 December 1943, original version available at https://www.ndl.go.jp/constitution/e/shiryo/01/002_46/002_46_001l.html accessed on 16 November 2021. Available also at https://rbscarchives.library.ubc.ca/uploads/r/university-of-british-columbia-library-rare-books-and-special-collections/e/c/ecae1ed788d4c9e606fdf31329904e888a0583f89a38a9c5cc212614edae5799/9bed4ea1-519a-4a58-a5ed-f59a32d786c8-rbsc_arc_1135_30_15_001.pdf accessed on 16 November 2021. See Boister, N & Cryer, R. (2008), *supra note 18,* p. 19.

41 Summary of AG-042 United Nations War Crimes Commission (UNWCC)(1943-1948), United Nations War Crimes Commissions, at United Nations Archives and Records Management Section, available at https://search.archives.un.org/downloads/united-nations-war-crimes-commission-unwcc-1943-1948.pdf accessed 18 January 2021. see also Schabas, W. (2014) The United Nations War Crimes Commission's Proposal for An International Criminal Court (Criminal Law Forum. Vol. 25. No. 1-2) Netherlands: Springer.

actively present at the constituent meeting of the commission, proposed to establish a twin commission that would focus on the Far Eastern events. On 10 May 1944, Koo's proposal was welcomed and the UNWCC Far-Eastern sub-commission was created in Chongqing[42] which was the temporary Chinese capital (since December 1937). The new institution was not incorporated in the domestic law of the country. It was waived from any national legal order and maintained an international asset[43].The sub-commission opened its doors on 29th November 1944. The commission was open only to governments at war with Japan and interested in far eastern issues. The Chinese head of the sub-commission was Wang Chonghui, Chinese lawyer with international law experiences who studied in the US[44]. The majority of the cases that were presented to the sub-commission (approximately ninety percent of the cases) were provided by the Chinese National office after being chosen and verified by the Chinese Ministry of Justice and the Ministry of Defence.[45]On 26 July 1945, at the Potsdam Conference the terms of surrender of Japan were issued by the US, China, and the UK and the Potsdam Declaration was adopted[46]. The Japanese Government accepted the Instrument of Surrender. Signed by Foreign Minister Shigemitsu on behalf of the emperor, it created a legal basis to punish Japanese aggression and for the establishment of the IMTFE[47]. As provided in the declaration "stern justice shall be meted out to all war criminals"[48]. On 19 January 1946 General MacArthur, Supreme Commander of the Allied Powers (SCAP), approved the Charter of the IMTFE and established the International Military Tribunal for the Far East (IMTFE) by Special Proclamation. The Special

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42 UNWCC, 1948 History of the United Nations War Crimes Commission and the Development of the Laws of War. p. 129 available at http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf accessed on 16 November 2021.

43 According to a memorandum of a foreign office in March 1943 the new panels such as the Far Eastern sub commission should enjoy highest autonomy. See *Ibid*. p. 129

44 See UNWCC, 1948 History of the United Nations War Crimes Commission and the Development of the Laws of War, *supra note 42,* pp. 129 – 130. See also Kushner, B. (2015) Men to Devils, Devils to Men, Harvard University Press. p. 41; Von Lingen, K. (ed.) (2016) War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil. Springer. p. 103

45 UNWCC, 1948 History of the United Nations War Crimes Commission and the Development of the Laws of War, *supra note 42,* p. 130

46 Proclamation Defining the Terms for Japanese Surrender, issued at Potsdam (26 July 1945)

47 Article 10 Potsdam Declaration, Proclamation Defining Terms for Japanese Surrender (1945) Potsdam. "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners". See also Boister, N & Cryer, R. (2008), *supra note* 18, p. 199.

48 Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment for an International Military Tribunal for the Far East, International Military Tribunal for the Far East (19 January 1946). available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf accessed on 16 November 2021.

Proclamation opens in Article 1 with the provision to try single individuals or "members of organizations, or in both capacities, with offences which include crimes against peace"[49]. The process for the creation of the IMTFE was very different from that in London, but the Charters of the two tribunals were very similar. For the Far East, the directive to proceed with the prosecution of war criminals came from Washington and SCAP drafted the Charter modelled on that in London[50]. It was in those years that Chiang Kai-shek smoothed his approach in an attempt to promote magnanimity as a new policy. This new attitude was based on the notion of *return good for evil* (以德报)[51]. According to this policy ordinary war criminals were to be handled with leniency while major ones such as those responsible or involved in the Nanjing Massacre were to be treated harshly[52].

2.4. *Early forms of International Criminal Prosecutions. Between Japan and the Mainland*

2.4.1. Sitting at the bench in Tokyo

The International Military Tribunal for the Far East (IMTFE) commonly known as the Tokyo Trial, represents the longest-lasting special tribunal in history running from May 1946 to November 1948. The Trial was set to try Japanese officials alleged criminally responsible for Crimes Against Peace (Class A), War Crimes (Class B) and Crimes Against Humanity (Class C) in the Far East between 1931 (Japanese invasion of Manchuria) and 1945 (Surrender of Japan). The trial resulted in the conviction of 25 Japanese defendants, seven of whom were sentenced to death, 16 to life imprisonment and two to minor terms. The Tokyo trial represents the precursor of international criminal prosecution in Asia. China had been stage of the most heinous atrocities by the Japanese war machine. This granted the country a relevant position in the establishment, unfolding, judgment and *causatum* of the

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49 Article 1, Special Proclamation, *supra note 51.*

50 Rogers, D. (2017). Law, politics and the limits of prosecuting mass atrocity. Springer. pp 35 – 36

51 Also translated in *repay grievance with virtue* or *repay hatred with kindness*. In his famous speech on 15 August 1945 celebrating the victory against the Japanese, Chiang Kai Shek said that evil against others did not have to be remembered (不念旧恶). See Kijima, J. (2005). Japan-Republic of China relations under US hegemony: A genealogy of' returning virtue for malice'. University of London, School of Oriental and African Studies (United Kingdom). See also Bihler, A. (2018) On a 'Sacred Mission': Representing the Republic of China at the International Military Tribunal for the Far East, In Transcultural Justice at the Tokyo Tribunal, Brill. p. 90

52 Bihler, A. (2018), *supra note* 51, p. 91

Tokyo Trial. Chinese resources and personnel were an integral part for the functioning of the tribunal.

Xiang Zhejun was at the lead of the Chinese prosecution team while sitting at the bench together with the other eleven judges from the various nations was Judge Mei Ju'ao. No communist representative from China was present at the trial.

Both the Mr. Xiang and Mr. Mei were proactively essential in the operations of the court within the scope of their function and finally in passing the majority vote. Furthermore, Xiang Zhejun was a key figure in deciding the starting date for Japanese aggression to set the temporal jurisdiction of the tribunal.[53] Mei Ju'ao instead was the one who pushed to have a separate chapter specifically on China in the judgment that he personally drafted.[54] The nationalist government supported the efforts of the Chinese team in Tokyo through extensive coverage on the progresses of the Trial and established a War Damage Investigation Committee to collect evidence useful for the IMTFE and national war crimes trials.[55] However, the KMT underestimated the complexity of the trial and despite government support, the evidence that China submitted to the tribunal was limited. Chiang Kai-shek's attitude of benevolence towards the Japanese together with the domestic political atmosphere restricted the various attempts and efforts in finding and collecting evidence within China. The prosecution team in Tokyo therefore had to engage in the collection of evidence and created the Nanking Massacre Investigation Committee. Nevertheless, results went short[56]. Chiang Kai-shek sent a list of 12 Japanese alleged major war criminals to the Department of State of the United States so that allied forces could arrest them. The prosecution selected five defendants out of the twelve[57] and Emperor Hirohito was not in any of the lists.[58] The KMT sought to implement an approach based on benevolence to show that the Chinese government had goodwill as form of justice. Despite public pressure urged for the emperor's

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53 Liu, D and Zhang, B. (eds.) (2016) Historical war crimes trials in Asia, 2016 (FICHL publication series), Brussels: Torkel Opsahl Academic Epublisher, no. 27. p. 34 referring to Xiang, L. (2010) 东京审判中国检察官向哲浚 *Dongjing shen pan: Zhongguo jian cha guan Xiang Zhejun (translated:* The Tokyo trial : Chinese prosecutor Xinag Zhejun) Shanghai Jiatong University Press.

54 Liu, D. and Zhang, B. (eds.) (2016)*, supra note 53,* p. 34. Mei Ju-ao (2005) 远东国际军事法庭 (International Military Tribunal for the Far East) Beijing Law Press. pp. 7–8. See also Mei, R. (2020) The Tokyo Trial and war crimes in Asia. Singapore: Palgrave Macmillan.

55 Liu, D. and Zhang, B. (eds.) (2016)*, supra note 53,* p. 34

56 Liu, D. and Zhang, B. (eds.) (2016)*, supra note 53,* p. 38

57 Kenji Doihara, Seishiro Itagaki, Hideki Tojo, Kingoro Hashimoto, Shunroku Hata.

58 Bihler, A. (2018), *supra note 51*, footnote 45, p. 91

arrest and prosecution, the KMT removed it from the list.[59] This attitude however, not only disappointed the Chinese people, but also the Chinese delegation in Tokyo.[60] Judge Mei Ju'ao commented on an article of the Japan Times on Chinese magnanimity:

日本时报载了一篇短文，叫做《中国人不报仇》，描写日本投降后中国人对日本人是何等宽宏大量，"视敌为友"。宽大固是美德，但是姑息、畏惧，却是懦怯。我读了这篇文章，颇有啼笑皆非之感。(1946年4月11日　星期四) [61] "The Japan Times published a short article called "The Chinese do not avenge", describing how magnanimous the Chinese were towards the Japanese and viewed them as friends after Japan's surrender. Mei continues, leniency is a virtue, but toleration and fear are cowardice. I read this article, and I feel quite ridiculous. (Thursday, April 11, 1946)"

This was one of Mei Ju'ao's statements. Mei was amongst the judges who opposed to allow mitigation of evidence before the judgement as suggested by President Webb, taking from Anglo-American practice.[62] After the release of the judgment in 1948, he reaffirmed his disagreement in relation to that special protection granted to the emperor freed from prosecution and the politics behind it.[63] Judge Mei was indeed very concerned about the judicial outcome of the IMTFE; for him the importance of the trial was beyond the determination of the fate of the accused. He saw the trial as a small cogwheel in the big machine of the development of international law and in the criminalization of aggressive warfare.[64] According to Judge Mei, judges in Tokyo were to speak in unison in order to give a consistent credible instance to the world public without leaving ground for doubts and concerns over the importance of prosecuting such crimes. Mei could not go back home meeting his elderly if those responsible for the atrocities in Nanjing were not prosecuted[65]. As reported in the relevant literature, in some records it was found that he pledged to commit

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59 Kushner, B. (2015), *supra note 44,* p. 43

60 "The prosecution attributed the lack of evidence to the uncooperative and indifferent attitude of the competent authorities in China" Cit. Bihler, A. (2018), *supra note 51*, p. 94

61 See 梅汝璈在"东京审判"时期的心迹 (Mei Ju'ao's thoughts on the Tokyo Trial) available at http://news.sina.com.cn/c/sd/2011-01-10/103621789467.shtml accessed on 16 November 2021. See also 11 April 1946, Ju-ao, M. (2019). The Tokyo Trial Diaries of Mei Ju-ao. In *The Tokyo Trial Diaries of Mei Ju-ao* (pp. 1-102). Palgrave Pivot, Singapore. p. 41.

62 Boister, N & Cryer, R. (2008), *supra note* 18, p. 92

63 Bihler, A. (2018), *supra note 51*, footnote 45, p. 94

64 *Ibid.* p. 96

65 See also Boister, N & Cryer, R. (2008), *supra note* 18, p. 92.

suicide if sentences did not include capital punishment[66]. The dynamics in Tokyo had an impact on the domestic political turmoil within China, and on those activities the two major parties were carrying out in order to be accepted as Chinese central authority. On the other hand, the same Chinese domestic dynamics influenced the trial in Tokyo. Both the CCP and the KMT submitted lists of Japanese soldiers, high officers and political leaders that were to be prosecuted on Class A charges[67]. Those lists often overlapped despite the different policy approach (take for instance the magnanimity policy of the KMT) and resulted in a richer outcome resulted from joint efforts. The proceedings at the IMTFE were much more drowned into political waters than what Nuremberg could be. Besides the fact that the involvement of eleven nations implied a degree of inward and outward domestic influence as was the case with China, the beginning of the Cold War after the atomic bombing of Hiroshima and Nagasaki shaped the American attitude, dominant and in control of many of the trial aspects. This, together with the political attitude of the allied often identified as Victors' justice, hindered the delivery of justice to the advantage of international and domestic politics and matters of security.

2.4.2. War crimes trials in transition: from Nationalist to Communist China

The trial in Tokyo gave rise to a series of post-war domestic trials. Starting from 1946, special military tribunals were established in Beijing, Shenyang, Nanjing, Shanghai, Taipei and other Chinese cities directed at lower ranking Japanese officials charged of class B and C crimes[68]. They applied international law, the law governing the trial of war criminals of 24 October 1946 (Article 13), pieces of legislation that the KMT promulgated[69], and provisions of the Chinese penal code relevant to the jurisdiction of the tribunal. With the founding of the People's Republic of China in 1949 and the transition from the nationalist government to the communist one, the laws enacted by the KMT before 1949 were abolished

66 Boister, N & Cryer, R. (2008), *supra note* 18, p. 258.
67 Kushner, B. (2015)*, supra note 44,* 84.
68 Differently from the Tokyo Trial that put emphasis on crimes against peace giving precedence to class A charges. See Jia, B. B. (2011). The Legacy Of The Tokyo Trial In China, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*. Leiden, Nijhoff publisher. p. 214
69 See for instance the 1946 国民政府关于战犯审判条例(National Government Regulations on Trials of War Criminals),《军事委员会 关于战犯审判办法》(Military Commission Rules on Trials of War Criminals),《军事委员会关于战犯审判办法试行细则》 (Measures for the Implementation of the Military Commission Rules on Trials of War Criminals) etc.

and the legitimacy of the KMT trials not recognised[70]. In 1953 the IMTFE judgment was translated in Chinese and the principles derived by it were used by the 1956 war crimes trials. The CCP enacted the *Decision for Dealing with Japanese War Criminals under Detention who Committed Crimes during the Japanese Invasion War* (关于处理在押日本侵略中国战争中战争犯罪分子的决定[71], better known as 'Decision on War Criminals' 战犯决定) adopted on 25 April 1956 by the Standing Committee of the First National People's Congress at its 34th meeting[72]. Article 2 of the Decision on War Criminals established that the Supreme People's Court had to organize Special Military Tribunals (SMT) to prosecute Japanese war criminals[73]. SMTs were established in the capital cities of Shenyang and Taiyuan in April 1956. 45 Japanese war criminals were prosecuted but there were not sentences to death, only rather lenient penalties[74]. The Decision on War Criminals contained provisions that set much more lenient standards compared to what the international tribunals provided (see primarily article 1 and article 5 of the Decision). There were 45 Japanese defendants pleading guilty at those trials who were *reformed* and *reeducated* and then released and sent back to Japan. On the same model as that of the KMT, the CCP started indeed to implement a degree of benevolence. It was mere political strategy in the legitimacy fights between the KMT and the CCP. Relying on the principles created in Nuremberg and in Tokyo, the SMT was dealing only with accountability of individuals for crimes committed against China in the Japanese war of aggression[75]. The alleged perpetrators were military commanders or superior officers, and the charges were mostly on war crimes and crimes against humanity with a few cases of aggression[76]. Mei Ju'ao together

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70 Kushner, B. (2015), *supra note 44,* p. 94

71 全国人民代表大会常务委员会关于处理在押日本侵略中国战争中战争犯罪分子的决定 [Decision of the Standing Committee of the National People's Congress on Handling War Criminals in Custody of Japan in the War of Invasion of China] (25 April 1956) Standing Committee of the NPC, 34th meeting. Available at, http://fgcx.bjcourt.gov.cn:4601/law?fn=chl340s875.txt&dbt=chl accessed on 16 November 2021.

72 Wilson, S., Cribb, R., Trefalt, B., & Aszkielowicz, D. (2017). Japanese War Criminals. Columbia University Press. p. 36

73 Article 2 Decision on Handling War Criminals, *supra note 71*

74 中央档案馆公布45名日本战犯侵华罪行自供，Central Archives announces 45 names of Japanese war criminals who committed aggression against China, gov.cn, 2014 http://www.gov.cn/xinwen/2014-07/04/content_2712047.htm accessed on 8 November 2021

75 See Decision on Handling War Criminals, *supra note 71*

76 Ling, Y. (2014) The 1956 Japanese War Crimes Trials in China (Historical Origins of International Criminal Law) vol. 2, (Bergsmo M., Cheah, W. L., Yi, P. Eds) Brussels: Torkel Opsahl Academic Epublisher (TOAEP). pp. 225 -226. "正义的审判 历史的铭记"访谈实录（一) ["Historical memories of Jusitce Trials" Interview records], Supreme People Court (2015) http://www.court.gov.cn/zixun-xiangqing-15269.html

with other international law experts and the deputy Secretary General of the Supreme People's procurator lectured and briefed the Chinese personnel involved in the investigation and prosecution of Japanese war criminals to better prepare them on SMT's relevant international law[77]. The PRC trials were legally weak and deficient. The crimes were not clearly defined nor clearly aimed at justice but at the political stability of the country under the new government. It resembled a transitional justice approach aimed at restoring and reconciling long-term relations with neighbouring countries[78]. Judicial efforts in relation to Japanese war crimes seemed rather political in an effort to avoid internal and international critics. In the post WWII Sino-Japanese context, criminal justice gained its momentum, but countries were undeniably influenced by matters of internal order and social stability. The decision not to prosecute emperor Hirohito and many of the choices in Tokyo reflected an approach that looked at long-term political status to guarantee stabilities.

3. **China at the International Criminal Tribunals. Prosecuting international crimes**

3.1. *A great leap forward to the golden decade of international criminal justice*

The transition from the Republic of China to the PRC had a direct impact on the country's involvement in international developments.

In the 1950s Chinese representation in international fora was already an issue. At the second session of the International Law Commission Mr Shuhsi presence was publicly objected because he was nominated under the ROC government. Despite normally ILC members sit in their individual capacity and not as representatives of their Governments[79], he had to step back and leave his seat to a new member that represented China's legal system. Mr Hsu's influence on any decision was not taken into consideration.[80] These mechanisms rendered

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77 Ling, Y. (2014) *supra note 76*, p. 224

78 Zhang, B. (2014) Criminal Justice for World War II Atrocities in China (Policy Brief Series) Brussels: TOAEP, p. 2

79 See the Introductory Note to the Statute of the International Law Commission available at https://legal.un.org/avl/ha/silc/silc.html accessed on 24 January 2021. See also Yearbook of the International Law Commission (1979) Volume II Part One, United Nations, A/CN.4/SERA/1979/Add.l (Part 1). p. 186

80 Report of the International Law Commission to the General Assembly (1950) 5th session (A/CN.4/34) Extract from the Yearbook of the International Law Commission (1950) vol. II (A/1316) p. 365

China almost silent in the development and codification of international criminal justice until the 1970s when the PRC membership was officially recognised at the United Nations.
Following international recognition, the PRC nominated Chinese legal experts to join international judicial bodies.[81]
Judge Liu Daqun was appointed by the UN Secretary General at the ICTY Appeal Chamber in 2000. In 2015 he was elected Vice-President of the ICTY, he worked on appeals from both the *ad hoc tribunals* and presided over the *Šainović et al.* case (ICTY) and the *Gatete case* (ICTR)[82].
This suggests that China already in the 1970s allowed its citizens to go abroad to learn western-led international education so to enable them to join the international community.
In 1993 China supported the establishment of the ICTY voting in favour of Council's Resolution 827. China showed concerns over the risk that such a mechanism could have had on the judicial sovereignty of a country however, the *ad hoc* nature of the institution and the peculiar situation pushed China to support the decision. Different was the Chinese attitude to the establishment of the International Criminal Tribunal for Rwanda (ICTR), the second *ad hoc* tribunal. China abstained when the SC adopted Resolution 955 establishing the ICTR. The Chinese representative explained that China's main concern was on the protection of state sovereignty, being the Rwandan government unsupportive in such judicial choice. However, being committed to criminal accountability, because of the *ad hoc* nature of the tribunal, and for the sake of the development of international criminal law, China did not vote against it but abstained[83]. Efforts came both from within and from outside.

3.2. *A Chinese voice in Rome*

In 1998, at the closing of the Rome Conference for the establishment of the International Criminal Court China cast a negative vote against the Rome Statute and decided to stay outside the jurisdiction of the Court. Such a decision did not keep China from participating in the continuing dialogue and evolving processes that the Court has undertaken.

81 Ni Zhengyu, Xue Hanqin, Li Haopei, Wang Tieya, Liu Daqun roles at the ICJ, ICTY and ICTR.
82 Judge Liu Daqun, International Residual Mechanism for Criminal Tribunals, available at https://www.irmct.org/en/about/judges/judge-liu-daqun accessed 16 November 2021
83 Jia, B.B. (2014) The Legacy of the ICTY and ICTR in China, (American Journal of International Law AJIL Unbound 110), Cambridge University Press, p. 24.

Furthermore, the Chinese position as permanent member of the Security Council binds China to continuous engagement. China was a proponent of the creation of a permanent international criminal court since the early idea and became a relevant figure throughout its phases. At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held from 15 June to 17 July 1998, China was a dedicated presence. Chinese delegates covered positions of vice-president of the conference as well as members of the drafting committee and credential committee[84]. Liu Daqun, who became a judge at the ICTY, was deputy head of the Chinese delegation. However, during the works and the negotiations for the drafting of the Court's Statute, China started to gradually grow its concerns.

3.2.1. The negotiating process

Difficulties in the negotiating process of the Rome Statute were mostly related to the risk that the Court's jurisdiction may infringe on state sovereignty. This raised questions related to state consent and the principle of complementarity.

The principle of complementarity was one of the few elements of the statute that survived all the stages of the ILC work and endured the negotiations in Rome. Difficulties came more in relation to its application. The legal aspects of the principle had to adapt to the political sensitivity of its application, and this turned to be extremely complicated. Discussions reached a compromise with article 17 of the Statute and the criteria for admissibility of the case.

China supported the principle substantively but hesitated over its application. It mostly questioned how admissibility criteria or the Court's automatic jurisdiction could apply to its substantive counterpart. This was part of the five reasons that China gave to justify its negative vote in Rome. Concerns were raised between June and July 1998 at the Conference and reconfirmed after the voting. They gravitated around both substantive and procedural matters including the Court's jurisdiction, the definition of the crimes, questions of

[84] See Officers of the Conference and its Committees, in Extract from Volume II of the Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Summary records of the plenary meetings and of the meetings of the Committee of the Whole) (A/CONR183/13 (Vol.II)) available at https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2/contents.pdf accessed on 16 November 2021.

individual liability, admissibility criteria and the voting process in Rome. Jia Bingbing identified the country 's behaviour as cautious when sensitive areas were at stake. Major critical subjects related to sovereignty, consent, interference into domestic states' affairs or the role of the Security Council.[85] In a nutshell, the Chinese government did not want the Court to become subject to political influence nor a tool of interference in countries internal affairs. China attributed great importance to the preservation of the role of the Security Council in the maintenance of peace and security. China also pushed for universal participation, vote by consensus, state consent in triggering mechanisms and the careful application of the principle of complementarity[86]. However, China held reservations on the idea of automatic jurisdiction. State consent to trigger the Court's jurisdiction is paramount when an international judicial body is at stake[87]. Furthermore, China shared its concerns on certain elements of the definitions of war crimes and crimes against humanity,[88] stressed on the importance of the link between the crime of aggression and the Security Council and wished for a widely agreed, clear and precise definition of aggression.[89] On individual criminal responsibility, China asked not to follow the Nuremberg approach and expected it to remain directed at single individuals and not to be extended at organizations. Concern was also raised on the powers of the prosecutor to initiate investigations[90] and on the role of the Security Council to refer cases to the ICC.[91] Some of the Chinese concerns were incorporated in the final draft of the Statute; others, such as automatic jurisdiction and opt-in system only for non-party states, remained unchanged.

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85 See Jia, B. B. (2006) China and the International Criminal Court: the current situation, Singapore Yearbook of International Law and Contributors (SYBIL, 10) p. 94 – 96.

86 Paragraphs 35 -36, Summary Record of the 3rd Plenary Meeting (20 November 1998) (A/CONF.183/SR.3) available at https://www.legal-tools.org/doc/313a47/pdf accessed on 16 November 2021.
See Statement by Ms Li Yanduan (9 July 1998) 29th meeting A/CONF.183/C.1/SR.29 para. 74. available at https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2/a_conf183_c1_sr29.pdf accessed on 16 November 2021

88 For a comprehensive explanation of the Chinese concerns over definitions of war crimes and crimes against humanity in Rome see Jia, B. B. (2006) *supra note 85,* p. 89. See also Summary Record of the 9th Plenary Meeting (25 January 1999) A/CONF.183/SR.9, para. 38.

89 See Statement by Ms Li Yanduan (19 June 1998) 7h meeting A/CONF.183/C.1/SR.7 para. 9. available at https://digitallibrary.un.org/record/1489287/files/A_CONF-183_C-1_SR-7-EN.pdf accessed on 16 November 2021

90 See Statement by Ms Li Yanduan and Ms Li Ting (22 June 1998) 10th meeting of the Committee of the Whole, A/CONF.183/C.1/SR.10 paras 9 and 84. See also 9th meeting of the Committee of the Whole (22 June 1998) A/CONF.183/SR.9 for further debates on the prosecutorial powers.

91 See Statement by Ms Li Ting (22 June 1998) 10th meeting of the Committee of the Whole, A/CONF.183/C.1/SR.10 paras 85.

Mr. Wang Guangya, Chinese representative at the third plenary session on 16 June 1998, shed some light on the Chinese government attitude Rome. [92]. He assured that China was still in favour of an independent, impartial, effective and universal Court of that kind to complement domestic legal systems. However, in his view there were five reasons for explaining PRC's negative vote:1. the power of the Court to exercise universal jurisdiction in breach of state sovereignty and the Vienna Convention on the Law of Treaties,

2. jurisdiction over war crimes in non-international armed conflicts and crimes against humanity in time of peace contrary to accepted customary international law.

3. the question of automatic jurisdiction and opt-in mechanisms

4. the Security Council role in the determination of aggression together with the twelve-months' time limit to defer a situation before the ICC which denied the Council of the capacity to act without constraints,

5. the *proprio motu* power of the prosecutor which, in China's view, may likely convey to power-abuse.

After achieving 60 ratifications, in 2002 the Rome Statute entered into force.

Despite the criticism submitted and the negative vote it cast, China continued to participate in the activities of the ICC, showing interest in its work and development. China signed the Final Act of the Rome Conference and joined the work of the Preparatory Commission[93] with active participation in the discussions and in the drafting of Court's documents[94]. In the years following the Rome Conference China actively engaged with the Sixth Committee of the General Assembly, contributed to the creation of the elements of crime, participated as observer state at the ASP meetings and in the discussions of the SWGCA, and took part in the negotiations over the crime of aggression at the Review Conference in Kampala.

In 2000, China congratulated on the progresses made with the Preparatory Commission including the adoption of the Elements of Crimes and the Rules of Procedure and Evidence.[95]

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92 王光亚谈 "国际刑事法院规约"[Wang Guangya talks about "the Statute of the International Criminal Court"] (29 July 1998), Legal Daily. Available at https://www.legal-tools.org/doc/bb0b03/pdf accessed on 16 November 2021.

93 See the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and Resolution F adopted by the Conference contained therein, A/CONF.183/13(Vol.I) (2002) New York: United Nations.

94 Dan, Z. (2018) China and the International Criminal Court (Governing China in the 21st Century) Singapore: Palgrave Macmillan. pp. 10 – 11; Jia, B. B. (2006) *supra note 85*, p. 92

95 Statement by Mr Qu Wensheng of the Chinese Delegation on Agenda Item 162, The Establishment of the International Criminal Court (2000) available at

With the entry into force of the Rome Statute, China reaffirmed the country's willingness to participate and contribute to the process for the functioning and development of the Court. It also restated its interest in collaborating with the international community for the progressive strengthening of the rule of law[96]. At a meeting of the Sixth Committee in 2002, Mr. Guan Jian urged for geographical representation and gender balance to uphold the principle of universality. He added that China has always supported the need of "*an international criminal court marked by genuine independence, impartiality, effectiveness and universality and very much hoped that its establishment would make it possible to bring to justice the perpetrators of the most serious international crimes, thereby helping not only to build confidence in international justice, but ultimately contributing to the maintenance of international peace and security"*[97]Shortly after the entry into force of the Rome Statute the Assembly of States Parties held its first session (Rome, September 2002) and established the Special Working Group on the Crime of Aggression (SWGCA). China was actively involved both at the ASP meetings as observer state and in the work of the SWGCA.

In 2005 a Position Paper by China on the United Nations Reforms, restated the country support for the establishment of an independent, impartial, effective and universal International Criminal Court to punish *the gravest international crimes*. It affirmed that "*in view of some deficiencies … which may hinder the just and effective functioning of the Court, China has not yet acceded to the Statute.* It also added that *we hope that the Court will win the confidence of non-Contracting Parties and* [would receive] *wide acceptance of the international community. The Security Council should act with prudence as to whether to refer a certain situation to the International Criminal Court".*[98] In the same position paper China also affirmed that it supports the endorsement of the *'Secretary-General's proposal concerning collective action against security threats and challenges,* which is consistent with *China's proposal for a new security concept that features "mutual trust, mutual benefit,*

https://www.fmprc.gov.cn/ce/ceun/eng/smhwj/wangnian/fy00/t29020.htm accessed on 16 November 2021.

96 Statement by Mr Guan Jian (15 October 2002) Sixth Committee, 15th meeting, A/C.6/57/SR.15, paras 47-49. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/639/49/pdf/N0263949.pdf?OpenElement accessed on 18 November 2021.

97 *Ibid*. para. 49

98 Position Paper of the People's Republic of China on the United Nations Reforms (7 June 2005), section III, paragraph 2. available at http://chnun.chinamission.org.cn/eng/chinaandun/zzhgg/t199101.htm accessed on 16 November 2021.

equality and coordination" and establish security mechanisms that adhere to multilateralism, democracy and international rule of law as enshrined in the UN Charter, strengthening the authority and capability of the UN and safeguarding the centrality of the Security Council to the collective security system'[99]. Furthermore, it contends that inter-state conflicts are to be addressed through peaceful negotiations and consultation, and internal conflict have to be judged on a case-by-case basis, in compliance with the UN Charter combining political and diplomatic measures, despite they could threaten world peace and security.[100] China also supports peaceful settlement of international dispute [101] and the establishment of peacekeeping commissions that have to be responsible to the Council.[102].China kept the same attitude until the opening of the Review Conference in Kampala.

Despite being ineligible to vote because not a state party, China sent a delegation in Kampala and reaffirmed its commitment in contributing to the continuous development of international criminal justice.

Main issues of concern for China were on the Court's jurisdiction that could be triggered without state consent (see for instance article 12(3) of the ICCSt), and through prosecutorial powers.[103] In relation to the former, the wording of article 12(2), more precisely the sentence *if one or more of the following States*, restricts state consent. On this, China sees articles 15(1), 15(2) and 13(c) in conflict with customary international law and with the principle of *pacta tertiis nec nocent nec prosunt*[104]. Concerns on the crime of aggression, and particularly on the court's capacity to proceed with an investigation even if the Security Council had not determined that an act of aggression occurred, remained also after the adoption of the Kampala amendments.[105] From Rome to Kampala, China consistently kept an ambivalent attitude of support and opposition to the work and functions of the ICC.[106]

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99 *Ibid.* Section II.

100 *Ibid.* Section II, paragraph 1.

101 *Ibid.* Section II, paragraph 7.

102 *Ibid.* Section II, paragraph 9.

103 王光亚谈 "国际刑事法院规约"[Wang Guangya talks about the Statute of the International Criminal Court] (29 July 1998), Legal Daily. Available at https://www.legal-tools.org/doc/bb0b03/pdf accessed on 16 November 2021.

104 Article 34, Vienna Convention on the Law of Treaties (1969).

105 Article 15*bis*(8) grants the prosecutor powers with proceed with an investigation in the event in which the Council does not make any determination that an act of aggression by a State has occurred within the first six months. See article 15bis(8) of the Rome Statute (2011). This aspect will be tackled more extensively later in this chapter.

106 Interviewee 3. See also Statement by Mr Qi Dahai (14 October 2004) International Criminal Court, Sixth Committee, 59th meeting, UN General Assembly. Available at http://chnun.chinamission.org.cn/chn/zgylhg/flyty/ldlwjh/t530464.htm accessed on 16 November 2021.

3.2.2. *Going back a little bit: China in the ILC work for the Draft Statute*

China was not only involved in the establishment and prosecutions of the international criminal tribunals, but it also engaged with the works of the International Law Commission for the establishment of the international criminal court, taking active part in the activities of the ILC Working Group on the Draft Statute for the International Criminal Court.[107] In the context of the negotiations for the creation of a permanent court, the General Assembly established the *Ad Hoc Committee on the Establishment of an International Criminal Court* and called for written submissions on the draft statute by states[108]. China was a member of the committee and made comments on institutional issues related to the new institution and to international law more broadly. It was already at that forum that China voiced its concerns on sovereignty and made its point on the complementary nature of the Court in relation to domestic jurisdictions. The court should not hold the status of a supranational judicial body with superior authority but cooperate with states on an equal level.

The Chinese engagement in the creation of the ICC draws back to the early ILC responses to the request by the GA to draft a statute for a permanent international criminal court as additional forum to implement the provisions of the draft code of crimes.[109] In 1992 the ILC established a working group to work on the Draft Statute for the International Criminal Court.[110] Represented by Qizhi He[111], China actively participated to the wide array of

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China abstained on Security Council Resolution 1539 (2005) to refer the Darfur situation to the Office of the Prosecutor (OTP). Available at https://www.un.org/press/en/2005/sc8351.doc.htm accessed on 16 November 2021. China believed that Sudanese courts could have worked on the case and handling it to the ICC would have breached the principles of complementarity, see *note 134* below. Jia, B. B. (2006) *supra note 85,* p. 97

107 Linton, S. (2018) India and China before, at, and after Rome (Journal of International Criminal Justice 16.2) Oxford University Press, pp. 268-269. Working Group on a Draft Statute for an International Criminal Court: report of the Working Group (8 July 1994) United Nations, A/CN.4/L.491/Rev.1.

108 Overview, Rome Statute of the International Criminal Court (19998-1998) United Nations. Available at https://legal.un.org/icc/general/overview.htm accessed on 16 November 2021.

109 Report of the International Law Commission on the work of its forty-second session (1 May - 20 July 1990) GA 45th Session, Supplement No. 10 (Yearbook of the International Law Commission 1990, vol. II (2)) paras. 98-99 available at https://legal.un.org/ilc/documentation/english/reports/a_45_10.pdf accessed on 16 November 2021.

110 Crawford, J. (1994) The ILC's Draft Statute for an International Criminal Tribunal (American Journal of International Law, 88(1)) Cambridge University Press. pp. 140-152.

111 Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995) GA 50th Session, Supplement No. 10 (Yearbook of the International Law Commission 1995, vol. II(2)) available at https://legal.un.org/ilc/documentation/english/reports/a_50_10.pdf accessed on 16 November 2021. Linton, S. (2018) *supra note 107,* p. 268.

meetings of the working group that resulted in the creation of the draft statute with commentaries (final version submitted in 1994)[112] and engaged in discussions about the work of the ILC in the Sixth Committee[113]. Diverging views were part of the whole negotiating process. Proposals for opt-in and opt-out mechanisms against the idea of automatic jurisdiction were submitted in 1993[114]. China has always been reluctant in its tradition to accept compulsory jurisdiction from an outside body and at the Sixth Committee expressed its position that aligned with the proposal[115]At the working group, Mr Qizhi He asserted the importance that states remained free to decide whether to accept the court's jurisdiction or not. That should have not been a direct consequence of accepting the Statute: *ad hoc* state consent was nonetheless necessary.[116] Mr Qizhi He's view was the same of the Chinese government in relation to the drafting of the court's statute.[117] The Chinese delegation played an influential role on the principle of complementarity. As previously observed, China objected to the idea of granting international tribunals primary jurisdiction over domestic ones, as was the case for the *ad hoc* tribunals (ICTY and ICTR) because in breach of the principles of sovereignty. In 1994, at the sixth committee, Mr. Kening Zhang reiterated the Chinese position. The new court should be complementary to national jurisdictions, not override them.[118] The same position was reiterated in the following years before and during the Conference in Rome.[119] In 1994 at its 49th Session, the General Assembly created the Ad Hoc Committee on the Establishment of an International Criminal Court.[120] The *ad hoc* Committee was established to review the major issues raised by the

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112 Working Group on a Draft Statute for an International Criminal Court: report of the Working Group (8 July 1994) A/CN.4/L.491/Rev.1; Revised Report of the Working Group on the Draft Statute for an International Criminal Court (19 July 1993) A/CN.4/L.490/Add.1. Working Group on the Draft Statute for an International Criminal Court (19 July 1994) A/CN.4/L.491/Rev.2/Add.1. See also Linton, S. (2018) *supra note 107,* p. 268.

113 See Zhu, D. (2018) *supra note 10,* p. 8

114 See the alternatives of draft Article 23 with Commentary. Draft statute for an international criminal tribunal and commentaries thereto, in Report of the International Law Commission on the work of its 45th session (1993) Yearbook of the International Law Commission, United Nations, pp. 107 -109

115 See Zhu, D. (2018) *supra note 10,* p. 49

116 *Ibid*.; See Statement by Mr. He (9 May 1994) Summary Record of the 2334th meeting, Yearbook of the International Law Commission vol.1, A/CN.4/SR.2334.

117 *Ibid*.

118 See Statement by Mr Kening Zhang (26 October 1994) Summary Record of the 18th meeting, Sixth Committee, General Assembly 49th session, New York. A/C.6/49/SR.18, para. 42

119 See Statement by Mr. Chen Shiqiu (31 October 1996) Summary Record of the 28th meeting, Sixth Committee, General Assembly 51st session New York A/C.6/51/SR.28., paras. 95 – 96. see also, General Statement at the UN Conference of Plenipotentiary on the Establishment of an International Criminal Court (ICC) by Mr. Wang Guangya Head of the Chinese Delegation. Available at https://www.legal-tools.org/doc/5b511e/pdf/ accessed on 16 November 2021.

120 Overview, *supra note 108.*

draft statute submitted to the GA and to start working to the convening of the related international conference. China was a member and participated giving constructive comments and rising points of concern. It delivered an extensive comment, in which it stressed the importance that the country sovereignty was preserved and that the court should complement domestic jurisdictions and cooperate with the state. China pointed out its preference for an opt-in system of adjudication in which consent should be at the basis of the court's jurisdictional authority and stressed the importance to respect the principle of legality, impartiality, and independence. The role and the functions of the SC under the UN Charter should not be affected, and the court had to remain independent and impartial.[121] In 1996 the Preparatory Committee was established to further develop the statute of the new court and make it widely acceptable. The work of the Committee was based on the draft statute of the ILC and took into consideration views shared by the *ad hoc* committee, the Sixth Committee and comments by states.[122] China engaged in the discussions of the Preparatory Committee mainly on substantive questions. It recommended that the court should maintain a neutral status[123], the powers of the prosecutor remain relatively limited, and that complaints were to be lodged only to interested states who accepted the jurisdiction of the court and were party to the statute.[124]

3.3. *China and the ICTs in the 21th century: double identity of a single country.*

Today the ICC has been in operation for almost two decades and has 123 Member States. China is still a non-State Party to the ICC, together with Russia, the US, India, Israel, and many others.

Despite not being a party, China has engaged with the ICC as Security Council permanent member and as observer state in a variety of manners. The permanent seat at the Council

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121 See China, in Comments received pursuant to paragraph 4 of General Assembly resolution 49/53 on the establishment of an international criminal court: report of the Secretary-General., (20 March 1995) A/AC.244/1. pp. 8 – 12.

122 Preparatory Committee on Establishment of International Criminal Court Begins First Session (25 March 1996) United Nations Press Release L/2761.

123 *Ibid*. Statement by Liu Zhenmin.

124 Conflict between Security Council Powers, International Court, discussed in Praparatory Committe. (4 April 1996) United Nations Press Release L/2777. Available at https://www.un.org/press/en/1996/19960404.l2777.html accessed on 16 November 2021.

grants China a relevant role in the international criminal justice system through Council resolutions for an effective functioning of the Court.

China was involved in most of the criminal courts and tribunals of the 21st century. As permanent member, voted in favour of the establishment of the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, the Special Tribunal for Lebanon, and for the establishment of the Residual Mechanism for International Criminal Tribunals.

In May 2004 China warned to veto a resolution that would have waived American troops from accountability for abuses in Afghanistan.[125] Security Council Resolution 1487 (2003)[126] was the third of a series of resolutions that requested the ICC not to investigate peacekeepers on the abuses in Afghanistan and that the US *expressed the intention to renew* it every 12 months.[127] China had not vetoed the previous resolutions but stood reluctant before a fourth one. The US had to withdraw the resolution because it did not reach sufficient numbers for it to pass.[128] The US reacted to the Chinese opposition accusing China to use its veto power for its own interests and as a weapon in relation to the Taiwan issue.[129] A series of mechanisms fully drown in political waters. In 2005 SC resolution 1593 referred the situation in Darfur to the ICC.[130] China abstained at the voting because, according to the words of Wang Guangya, there are more effective and feasible approaches to address impunity situations in Darfur. Ensuring justice also presupposes to avoid a negative impact on the politics of the country which could anyway result into suffering and injustice, Wang Guangya continued. Processes of national reconciliation can be structural in post-conflict and reconstruction societies and may result into a more rapid settlement of disputes than what retributive justice could bring. This is the Chinese inclination.[131] It is a pragmatic

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125 Lynch, C. (29 May 2004) China may veto Resolution on criminal Court, Washington Post Staff Writer A22. Available at https://www.washingtonpost.com/wp-dyn/articles/A64378-2004May28.html accessed on 16 November 2021.

126 Security Council Resolution 1487 (2003) 4772nd meeting, S/RES/1487(2003).

127 Security Council Resolution 1422 (2002), 4572nd meeting, S/RES/1422(2002).

128 For a resolution to pass it needs no veto from any P5 and 9 votes from the 15 SC members.

129 The United States had supported Taiwan to be included as observer state at the World Health Organization. See Participation of Taiwan in the World Health Organization (14 June 2004) Public Law 108-235, 108th Congress, congress.gov.

130 Security Council Resolution 1593 (2005) 5158th meeting, S/RES/1593 (2005)

131 See Statement by Mr. Wang Guangya. Full statement (cit) "The Chinese delegation abstained in the voting on the resolution. We have always closely followed the situation in the Darfur region of Sudan and support efforts to reach an agreement on an early political settlement of the question of Darfur through the negotiations held under the auspices of the African Union (…) we deeply deplore the gross violations of international humanitarian and human rights law in Darfur. Undoubtedly, the perpetrators must be brought

approach in the search for peace, with a rather political attitude that overshadows any possibility of a focused legal analyse to address the legal issues in order to trigger the complementarity regime of the ICC in relation to the situation in Sudan.[132] Notwithstanding the different view and concerned approach, China did not veto resolution 1593 but abstained. Similar approach was taken in relation to the proposed resolution by the SC in 2013 to defer investigations and prosecutions of the Kenyan situation. In this case, China was in favour of the Council's resolution and regretted it did not pass. The Chinese delegation explained that such an attitude sought rather to support internal dynamics that would have favoured the maintenance of peace and security.[133] Mr Liu, in his capacity as representative of China, stressed the importance that judicial bodies uphold the principles of complementarity, judicial sovereignty, and respect the legal tradition of the concerned country when internal peace and stability are at stake.[134] In 2011, China voted in favour of SC Resolution 1970 that referred the situation in Libya to the ICC. In this case the referral was functional to end violence, and to restore order and stability in a peaceful manner.[135] On the contrary, China opposed to the Council's proposed resolution to refer the Syrian situation to the ICC[136]. The two main pillars of China's approach, respect for the principle of complementarity and state

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to justice. The question is: what is the most effective and feasible approach in this connection? In addressing the issue of impunity, we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur. When punishing the perpetrators, it is also necessary to promote national reconciliation. When trying to solve the question of Darfur, it is also necessary to sustain the hard-won results in the North-South peace process. Based on that position and out of respect for national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. (...) We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan. It should also be pointed out that China is not a State party to the Rome Statute and has major reservations with regard to certain of its provisions. We cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC. For those reasons, China had no alternative but to abstain on the draft resolution sponsored by the United Kingdom". Reports of the Secretary-General on the Sudan, Security Council 5158th meeting (31 March 2005) S/PV.5158, United Nations, New York

132 China has been a strategic partner of Sudan in relation to arms exports and oil imports beneficial for the country economic growth. See China's Involvement in Sudan: Arms and Oil, Human Rights Watch, (2003). available at https://www.hrw.org/reports/2003/sudan1103/26.htm accessed on 16 November 2021.

133 Statement by Mr. Liu Jieyi (15 November 2013) Security Council 7060th meeting, S/PV.7060, pp. 12 and 16.

134 *Ibid.*

135 See Statement by Mr. Li Baodong (26 February 2011) 6491st meeting, S/PV.6491, p. 4

136 French Draft resolution 348 (22 May 2014) S/2014/348 vetoed by China and Russia. Security Council *Provisional*, The situation in the Middle East (22 May 2014) 7180th meeting, S/PV.7180. pp. 13 – 14

sovereignty, were restated again in relation to the situation in Syria. For China, referring the situation to the ICC could have jeopardized efforts towards internal political settlement of the country[137]. In the exercise of its role as a permanent member of the Council in relation to international criminal justice, China seems to have constantly proved its support for the maintenance of peace and security over the pursuit of justice.

Concluding remarks

China has adopted a cautious attitude towards the Rome Statute and its amendments, and it acted cautiously when significant legal, political and cultural concerns were at stake.

China was part of all the negotiations leading up to Rome and Kampala, did not oppose to the establishment of the *ad hoc* international criminal tribunals and it has not concretely opposed to referrals nor deferrals of the SC except for the case of Syria.

When China asked the Council to suspend the ICC's arrest warrant against President Omar al-Bashir it qualified this decision as *an inappropriate decision made at an inappropriate time*[138]. China's continuous adherence to the preservation of the principle of sovereignty as part of the country foreign policy suggests an inclination for a *quasi*-total rejection of external intervention into internal affairs.

Since the establishment of the Court, China has shown a consistent attitude in terms of participation at the various fora and in relation to the questions of sovereignty, complementarity and the role of the Council. However, it has also demonstrated a high degree of incoherence in relation to the application of the functions and jurisdiction of the Court mainly when they could affect in any way the country. China's changes in approach seemed to strongly reflect the country policy preference in accordance to the context and the issue at stake.

4. Ambivalence within different understandings of the maintenance of peace and security. China and the crime of aggression.

4.1. *Evolution from the early twentieth century.*

[137] Statement by Mr. Wang Min, Security Council, *Provisional,* The situation in the Middle East (22 May 2014) 7180th meeting, S/PV.7180. p. 13

[138] Xiao, J. Zhang, X. (2013) A Realist Perspective on China and the International Criminal Court (FICHL Policy Brief Series No. 13) Oslo: TOAEP, p. 1.

"*We are told that it was at least 400 years before Christ that the Chinese philosopher, Mo Ti, urged that international aggression be abandoned and that wars be outlawed as the greatest of all crimes*".[139]

Traditional Chinese culture never truly supported or glorified war, and certain Chinese philosophies such as Mohism or Confucianism would find it almost unacceptable. Yet, the reality had been in most cases very different. War and aggression were the best-known means to gain power and preserve order and security.

Modern-times war dynamics were very much different from traditional ones. They were very complex, involved external interference from different cultures and countries at different stages of development.

The 19th century and the first half of the twenty Century had been tumultuous years for China in its relations with the outside world. Despite it had never been colonized as many other countries at that time, China was forced into some sort of international trade wars by Western European imperialist powers.

There was no system of collective security as we understand it today. Aggression and the use of force were not prohibited at that time, no protection existed against its threat or actual occurrence. Relations were based on diplomacy and power-balance, the protection of state sovereignty was a major prerogative and war was part of it, considered "*a true political instrument, a continuation of political intercourse, carried on with other means"*[140].This started to change with the end of WWI and the Peace treaties that resulted from it when the concept of aggression or war of aggression and responsibility started to be associated (i.e. art. 227 Treaty of Versailles). The League of Nation was born and in the name of international peace and security the idea of setting rules regulating recourse to war and aggression started to spread.[141] A series of multilateral treaties flourished to limit the right of recourse to war and regulate aggression[142] among which the 1928 Kellogg-Briand pact. China, being both a victim and a new emerging power in search for visibility and recognition became a signatory

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139 Ferencz, B. (n.d.) Defining international aggression the search for world peace a documentary history and analysis. Dobbs Ferry, New York: Oceana, vol. 1, p. 23, citing Harley, E. J. (1950) Documentary Textbook of the U.N., Los Angeles: Center for International Understanding.

140 Cit. Von Clausewitz, C. (1976). On War, ed. and trans. Michael Howard and Peter Paret, Princeton University Press p. 87

141 Articles 10- 15, Covenant of the League of Nations.

142 See for instance the Draft Treaty of Mutual Assistance (1923), Protocol for the Pacific Settlement of International Disputes (1924), Resolutions of the League Assembly and of the Sixth International Conference (1925-1928)

of most of those treaties. Relevant to the fight against aggression was the Sino-Soviet Non-Aggression Pact of 1937, signed by the Chinese with the Soviet Union in Nanjing in response to Japanese invasion.

China has always been supportive of the idea of criminalizing aggression most likely due to the victim-status that China was subject to[143]. However, different historical and political contexts in transition between the twentieth and twenty-first century have shaped the Chinese attitude in relation to the crime.

4.2. Aggression under the Republic of China

4.2.1. Taking the time-frame of the IMTFE *rationae temporis* (from the 1931 Japanese invasion of Manchuria to Japan's 1945 surrender)

Same as the attitude shown in the development of international criminal justice and the relevant tribunals, the KMT phase saw the Chinese government aligning with the various efforts in the creation and prosecution of crimes against peace.

However, while the Chinese attitude in the interwar period was born out of the needs to improve and secure the country status, the events of WWII and the atrocities that China suffered at the hands of the Japanese triggered in the country different feelings of response.

China was among the minority of the countries who supported the Kellogg-Briand pact as legal basis for criminalizing aggression and urged a response from the League in relation to the Japanese invasion of Manchuria, in breach of the Pact. However, the responses that the League and the Nine-Power Treaty provided were very weak, they served more as a *quasi*-moral support.

In 1933, China participated in the discussions surrounding the Litvinoff's statement on the subject of aggression. For Litvinoff (USSR), the key issue was the absence of a universally acknowledged definition of aggression. Defining the elements and the scope of aggression were undoubtedly necessary to identify the aggressor in armed conflict as well as for an international tribunal to start an investigation[144]. The Soviet definition was submitted on 6

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[143] Often referred to as the century of humiliation by the Chinese.

[144] Report of the Special Committee on the Question defining Aggression, GA 23rd session, A/7185/Rev.1, United Nations. p. 15 available at https://digitallibrary.un.org/record/774843/files/A_7185_Rev-1-EN.pdf accessed last on 16 November 2021. See Ferencz, B. B. (1972). Defining aggression: where it stands and

February 1933 to the General Commission of the Disarmament Conference for consideration, namely the Litvinov-Politis definition (it is known to be the first definition of aggression). It recognized the right to independence, security, territorial inviolability and non-interference in the internal affairs of another state[145]. China supported the proposed Soviet definition embracing the idea that defining aggression was an essential element for any related consideration and practice to work effectively and consistently[146]. The unstable situation of those years, mainly in the far east, emphasized the need of effective instruments, and to define aggression was perceived to be a potential peace-preserving device at the disposal of the international community.[147] The Soviet proposed definition was handed over to the Committee on Security Questions that drew an Act on the definition of the aggressor made of a list of five basic criteria. It identified the aggressor as the State that employs force outside of its territory[148]. Despite the definition of aggressor as spelled out in the Act was very broad and imprecise, Wellington Koo on 29 May 1933 took a positive stand in support of it. He believed that in order to limit and discourage aggression and promote security, practical and concrete rules to "organize peace" were to be adopted in view of the establishment of a new international order. Better to have imperfect rules than none at all.[149]. Mr Koo represented the ROC at the UNWCC and was elected chairman at the Far Eastern and Pacific sub-commission.[150] He actively participated at negotiations for the establishment of the military tribunals both in Asia and in Europe and saw his position as effective tool to make sure Japan's war of aggression would not go unpunished. At the debates in Europe, he aligned with Czechoslovakia and Australia, against British and American stances, on the view that the Kellogg-Briand Pact set the foundation for a general understanding that aggressive war was a criminal act[151]. In September 1944, the majority report of the Legal

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where it's going. (American Journal of International Law, 66(3)) Cambridge University Press, p. 491-492; and Ferencz, B. B. (n.d.) *supra note 139*, p. 29

145 *Ibid*.

146 See Definition of aggression: Draft Declaration Proposed by the Delegation of the Union of Soviet socialist Republics: General Discussion, (10 March 1933) 8th meeting, p. 49, Document 10, in Ferencz, B. B. (n.d.) *supra note 139*, p. 207

147 *Ibid.*

148 Whiteman, M.M. (1965) Digest of International Law, Washington: U.S. Department of State Publication 7873, Vol. 5. pp. 734 – 739

149 Mr. Wellington Koo (China), Report of the Committee on Security questions: definition of Aggressor, 69th meeting, pp. 551 552, Document 13 Ferencz, B. B. (n.d.) *supra note 139*, pp. 246 -247

150 Lai, W. W. (2014). China, the Chinese Representative, and the Use of International Law to Counter Japanese Acts of Aggression: China's Standpoint on UNWCC Jurisdiction. In Criminal Law Forum (Vol. 25, No. 1-2). Springer Netherlands. pp. 120 - 124

151 See UNWCC (1948), *supra note 46*, pp. 182-183

Committee of the UNWCC contended that individual acts committed with purpose to prepare and launch aggressive war cannot be considered war crimes. On the other hand, the minority report presented by Ecer (Czechoslovakia) opposed to this view recognizing aggressive war as a criminal act that triggers individual responsibility. Wunsz King (the Chinese delegate who would take the role of Mr. Koo when not in London) showed support to the minority report[152] and explained that the majority report was too strictly legal that would have been not functional to the progress of international law and the punishment of war criminals. Wunsz King was also one of the figures that supported the idea of punishing the emperor and the prime minister. For the sake of justice and long-term stability high-ranking officials were more important than those below them[153]. This view was shared by the Chinese government more generally. The atrocities of World War II triggered a two-fold mechanisms of responses in China. On the one hand China endorsed the idea that a new system of collective security was necessary and engaged for its creation from Dumbarton Oaks to San Francisco through the establishment of the United Nations. This was all part of the same efforts that would guarantee China that aggressive states could be held responsible for acts or wars of aggression. On the other hand, the positions and commitments China undertook from the disarmament Conference to the UNWCC and the Pacific sub-commission, demonstrated China's understanding that aggression also implied individual criminal responsibility for which a new system of international criminal justice was to be developed.

At the IMTFE the focus on crimes against peace was considerable. The Tokyo Charter set charges of crimes against peace against the defendants to be the main charges and the others to rise only secondarily.[154] No defendant could be prosecuted on any charge before being charged of committing crimes against peace.

Article 5 did not give any definition of what aggression or a war of aggression were but made it clear that they were the conditions for crimes against peace to exist. This made the collection of evidence even more difficult and the trial more controversial.

China remained consistent with its previous attitude. The criminalization of aggression was legitimate and Japanese leaders were to be held individually liable for the aggressive war they waged and the atrocities it carried. There were no issues of retroactivity, and the

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[152] *Ibid.* pp. 181 -184

[153] Lai, W. W. (2014) *supra note 150,* p. 121

[154] See Article 5, IMTFE Charter

barbarities of the Axis left no doubt that aggression occurred. By then, also Nuremberg was a precedent.

China joined the seven judges that formed the majority in drafting the final judgement, and that became the Tokyo judgment.

The majority, including China, insisted on the validity of prosecuting crimes against peace on the basis that it was part of the jurisdiction of the Tribunal as enshrined in its Charter. Furthermore, the Nuremberg judgement had already been delivered creating a precedent.[155] The Chinese delegation in Tokyo followed in most cases the majority attitude. It did not oppose to the absence of a definition and comprised in the idea of war of aggression the domination of another state and territorial acquisition. Knowledge on the part of military leaders and officials was the condition for such a large-scale operation to occur[156]. Judge Mei Ju'ao was the only figure from the bench who agreed explicitly with Webb's position on conspiracy and joint enterprise in waging aggressive war for which individual criminal liability exists (art. 5). The execution of a common plan to wage war creates *per se* individual responsibility over the accused for waging it without going further on the analysis of conspiracy, planning, preparation or instigation[157].Differently from the attitude of Pahl from India that rejected the existence of a crime of aggression as imperialist hypocrisy, the Chinese nationalist government saw the long-term impact of such a decision and went beyond the pure legal and judicial constraints.

As already seen, the Tokyo Trial has been a fundamental forum for the establishment and the development of the crime of aggression. Despite, and to a certain degree thank to, all the debates and controversies surrounding the legitimacy of crimes against peace in the post world war, and later by the UNGA Res of 1946 affirming the Nuremberg principles, such a crime was widely recognized and accepted to the degree that the international community went on in codifying and institutionalizing it into the crime of aggression.

4.2.2. Crimes against peace in an early Nanjing and a late Tokyo

[155] See Boister, N & Cryer, R. (2008), *supra note* 18, p. 121

[156] *Ibid.* p. 122 – 128

[157] See Boister, N & Cryer, R. (2008), *supra note* 18, for a more extensive analysis of the application of the doctrine. pp. 221 – 227.

On 29 August 1946 a Japanese military commander, Takashi Sakai, was tried on charges of crimes against peace and other offences before a Chinese war crimes military tribunal established by the Chinese Ministry of National Defence.[158] Takashi Sakai was accused of taking part in the Japanese undeclared war of aggression and to contribute to the Japanese occupation of Chinese territories. He was a military commander in China between 1931 (Manchuria) and 1945. The tribunal applied the Chinese Rules Governing the Trial of War Criminals[159] that was later replaced by the Law Governing the Trial of War Criminals also known as the Law of 24 October 1946. Some of the charges were made under Chinese domestic law on offences threatening the state internal security. Article 1 of the Chinese rules provides,

In the trial and punishment of war criminals, in addition to rules of international law, the present Rules shall be applied; in cases not covered by the present Rules, the Criminal Code of the Chinese Republic shall be applied.

In applying the Criminal Code of the Chinese Republic, the Special Law shall as far as possible be applied, irrespective of the status of the delinquent.

Within the jurisdiction of the tribunal, crimes against peace were defined as "planning, conspiring for, preparing to start or supporting, an aggression against the republic of China". The defendant was the first leader ever convicted and executed for crimes against peace.

Chiang Kai Shek signed the decision of the tribunal to execute Mr. Takashi Sakai by public shooting. His execution, on 30 September 1946, predated any decision in Nuremberg and Tokyo.

The tribunal in Nanjing examined a wide array of evidence including Sakai's orders to Chinese authorities and other documentation found in the administrative bodies in northern China. Evidence was strengthened also by the deposition of the Japanese General Tanaka Ryūkichi at the IMTFE in Tokyo. He proved Sakai's responsibility for committing offences that threatened the internal security of China and violated the territorial integrity of the

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158 See Notes of the Case, in Trial of Takashi Sakai, Case No. 83 (29 August 1946) Law Reports of Trials of War Criminals, vol. 14, p. 1 available at https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf accessed on 16 November 2021.

159 Chinese Rules Governing the Trial of War Criminals, Chinese War Crimes Military Tribunal of the ministry of National Defence, Case No. 83, Trial of Takashi Sakai (29 August 1946). The Chinese rules were later replaced by the Chinese Law Governing the Trial of War Criminals (24 October 1946). Available at https://www.legal-tools.org/doc/94d22f/pdf/ accessed on 10 November 2021.

country. He was accused of committing crimes against peace[160] in breach of the Nine-Power Treaty and the Kellogg-Briand Pact and in accordance with the criminal code of the ROC.

4.3. *China at the drafting forums*

4.3.1. China and the International Law Commission's work on the draft Code.

In the midst of its domestic transition, China tried to remain an active figure in the works and negotiations that followed the end of the post-war tribunals.

The country was a member of the Special Committee set up by GA Resolution 688 (VII) of 20 December 1952 that was created to work on the draft definition of aggression. Mr Shushi Hsu was nominated by Nationalist China to represent the country at the Special Committee sessions[161]. He was among those who believed that submitting any definition of aggression could be avoided. In one of China's later statements at the Sixth Committee this view seemed to be restated; it was stated that a definition of aggression could limit the flexibility of the UN and make peace more difficult[162]. However, following the Committee approach and demands, China submitted two working papers with a proposed draft definition of aggression and a recommendation for the Security Council to consider aggression a crime against the peace and security of mankind carried out by a State that used force unlawfully against another State. This was transmitted to the GA.

Mr Shushi Hsu stressed the fact that aggression cannot be limited only to the use of armed force. There are various forms of aggression that need to be distinguished and defined. For instance, the illegal use of force in violation of territorial integrity and political independence of a state, is different from the settlement of an hegemonic power within the territory of another state, which differ as well from economic aggression [163]. On 24 October 1949 at the

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160 Bergsmo, M., Cheah, W. L., & Yi, P. (Eds) (2014). Historical origins of international criminal law (FICHL Publication Series No. 21 vol. 2) Brussels TOAEP, pp. 281 -284.

161 Early discussions on PRC representing member already took place but eventually that question was dropped. Report of the Special Committee on the Question of Defining Aggression (24 August to 21 September 1953) General Assembly 9th Session, Supplement No. 11, A/2638, pp. 1-15, in Document 6, in Ferencz, B. B. (n.d.) *supra note 139*, vol. 2. pp. 4-6.

162 *Ibid.*

163 *Ibid.*

Sixth Committee of the General Assembly Mr Hsu affirmed, "l'emploi de la force, qu'il soit légitime ou non, doit être tempéré par des principes d'humanité et l'on doit s'abstenir de cruauté envers les personnes ennemies et d'agression contre les populations civiles ennemies[164]. In those same years, China tried to remain involved also in the work of the ILC's Draft Code of Crimes against Peace and Security of Mankind[165]. In pursuance of the GA resolution 378 B(V) of 17 November 1950, the ILC met several times to study the proposals submitted to the first committee dealing with the question of aggression[166]. The first draft Code was submitted by the ILC in 1951.

The ILC in its work drew also from the Chinese Law of 1946 governing the trial of war criminals as source of law and state practice in support of the recognition and codification of crimes against peace[167].

4.3.2. Critical stance on the General Assembly Resolution 3314

The Definition of Aggression annexed to Resolution 3314 of the General Assembly was the result of several years of negotiations and work by the Special committee on the Question of the Definition of Aggression and was adopted on 20 November 1974 at its 1503rd meeting without a vote.

The Chinese involvement and contribution to the 1974 Definition was limited. The PRC was out of the United Nations until 1972 and was therefore deprived of the chance to take active part in the definition efforts. But also the ROC started to be curbed in its participation at international fora since the government change in China.

As soon as China acceded the UN it immediately advanced its concerns and disagreements in relation to a series of deficiencies contained in the definition. If voting was possible, China would have cast a negative one. China was very critical of the wide discretionary powers

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164 Mémorandum présenté par le Secretariat, Draft Code of Offences against the Peace and Security of Mankind. Yearbook of the International Law Commission, Vol. II, A/CN.4/39, para. 144 p 352.

165 See the Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, Vol. II (Part Two).

166 See ILC report on the Definition of Aggression (1951), in Watts, A. (1999). *The International Law Commission 1949-1998: Volume Three: Final Draft Articles of the Material* (Vol. 3). Oxford University Press on Demand, pp. 2128 – 2131.

167 See Draft Code of Offences against the Peace and Security of Mankind, Yearbook of the International Law Commission (1950) vol. II p.268, paras 88a-90 https://legal.un.org/ilc/publications/yearbooks/english/ilc_1950_v2.pdf

granted to the SC and its permanent members. The permanent members of the Council could have easily abused their veto power and take advantage of their position to carry out acts of aggression without risk of prosecution[168]. China thought it impermissible to give a few imperialist powers the final word over aggression[169]. To condemn aggression rising to international responsibility while permanent members of the council could easily veto it was a contradiction. China was not surprised that the superpowers where enthusiastic in defining aggression boasting the achievements of their peace initiative while engaging in expansionist efforts. Determination of aggression by the UN should involve active participation of all the UN member states, either big or small, not just the Council superpowers[170].

China scepticism over the SC's role and powers was counterbalanced by its support to the GA's endeavours[171].

As seen above, Resolution 3314 is made of a preamble and eight operative articles. The operative articles contain general provisions based on article 2(4) of the Charter[172] and a list of acts constituting aggression[173].

China was very critical of articles 1 to 4 of the draft. They referred respectively to the determination of aggression, to the broad discretionary powers of the Security Council and to the acts identifiable as acts of aggression. China was very insistent on the inclusion and determination of self-defence[174].

At the 1475th meeting of the sixth committee of October 1974, the Chinese member An Chih Yuan[175] commented on the draft definition submitted by the special committee. He restated the importance of preserving state sovereignty and independence and the right to self-determination of a State. He took the stand of third-world countries, constant victims of

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168 Zhu, D. (2015). China, the Crime of Aggression, and the International Criminal Court (Asian Journal of International Law, 5(1)) Cambridge University Press, p. 112.

169 See Statement by Mr Ling (20 November 1973) Summary record of the 1442nd meeting, Sixth Committee, GA 28th session, New York, A/C.6/SR.1442, paras 73 – 78.

170 See Statement by Mr Ling, *supra note 169*, para 77.

171 See for instance China's vote in favour of the resolution on the apartheid (Res. 36/172A) regime in 1981 determining the existence of acts of aggression, see the meeting record of the GA 36th session, 102nd plenary meeting (17 December 1981) New York, A/36/PV.102 para. 205. The GA has determined aggression and acts of aggression in various situations since the aftermath of WWII. See for instance also the Resolution 36/27 (13 November 1981), Israeli aggression against Iraq, A/36/27, or Resolution 498 (1951), Resolution 1899 (1963); Res. 2508 (1969), Res. 46/242 (1992) etc.

172 Article 1, Definition of Aggression, annexed to Res. 3314 (XXIX) (1974)

173 *Ibid, Article 3.*

174 This is also associated with the 1951 aggression against Korea that recognised China as aggressor State.

175 See Statement by Mr An Chih-Yuan (14 October 1974) Summary record of the 1475th meeting, Sixth Committee, GA 29th session, A/C.6/SR.1475. Paras 13 – 18

imperialist and colonialist aggression. China had always supported the oppressed populations, it believed that armed struggle to protect the sovereignty of the oppressed state was legitimate and was supposed to be included in the committee draft to protect self-determination of people[176].

Other reservations reflect those of the 1950s. The PRC representative did not agree[177] with the exclusion of *territorial annexation and expansion, political interference and subversion, and economic control and plunder* from the list of acts of aggression that would legitimate many crimes of aggression at the hands of the superpowers[178]. Social imperialism could equal to aggression, according to China[179].

China thought that identifying aggression was far more important than define it. A definition of aggression would have not been that necessary where the permanent members could just cast a negative vote at their will.

The GA Res. 3314 did not address individual criminal responsibility. The complexity of drafting it resulted into a definition that was intended to be a guidance to the Security Council in the determination of states' acts of aggression, not to serve a court to identify an international crime. That definition to be used for judicial purposes should have been narrowed down, refined and purposely defined together with clear elements of the crime. China was critical on this.

4.3.3. Approaching Rome on a shifting mode

Getting towards the time of the Conference in Rome, the discussions at the Preparatory Committee embarked on a two major lines of thought. On one side there were those who favoured a definition based on GA Res. 3314 (XXIX) and on the other, those who believed that the 1974 definition would be in breach of the principle of legality if transposed to an international crime. No agreement over a definition of aggression was reached.

Between 1994 and 1998, China was actively involved in the various international fora that worked on the establishment of the International Criminal Court. However, in those years,

176 *Ibid.* See also Statement by Ho Li-liang (21 November 1974) Report of the Special Committee on the Question of Defining Aggression, 1503rd meeting, A/C.6/SR.1503, paras 9 – 11.

177 See Aggression Defined by Consensus, Ferencz, B. B. (n.d.) supra note 139, vol. 2. p. 30

178 *Ibid*. para 14.

179 *Ibid*. para 17.

the Chinese attitude started to change mainly in relation to the role and functions of the Security Council over the crime of aggression.

Article 23(3) of the 1994 ILC draft Statute asserts that,

"No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or-an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides" (art 23(3)).

At the fourth session of the preparatory commission China, Russia and the UK favoured the deletion of Article 23(3) of the ILC Draft Statute and expressed interest in the proposal made by Singapore in 1996. The Singaporean delegation suggested that the prosecution could not proceed if the Security Council otherwise decided but requiring a decision by the five permanent members and four of the non-permanent ones[180]

However, at one of the GA Sixth Committee meetings in 1997 Duan Jielong affirmed:

"The inherent jurisdiction of the court, when extended to cover all core crimes, would accord precedence to the court over national courts; that was clearly at variance with the principle of complementarity and could adversely affect the cooperation between States and the court and the effective functioning of the court". [181] China in this occasion seemed to support any proposal that would ensure the independence of the court and at the same time reasonably reflect the special role of the SC in the maintenance of international peace and security. The delegation believed that the draft provisions prepared by the International Law Commission on the Security Council were acceptable.

Within a few years the Chinese approach gradually changed to the point that in Rome it almost reversed.

4.4. *From Rome to Kampala*

[180] Hall, C. (1997). The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court (American Journal of International Law, 91(1)) Cambridge University Press, p. 181; Hall, C. (1998). The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court (American Journal of International Law, 92(1)) Cambridge University Press, p. 124,131 - But seems no change of view with respect to article 23(2) of the ILC Draft

[181] See Zhu, D. (2015), *supra note 168,* p 97 – 98. Statement by Mr. Duan Jielong (21 October 1997) Summary Record, 11th meeting, Sixth Committee, 52nd session, A/C.6/52/SR.11, para 97 .

4.4.1. A change in preconditions

At the conference in Rome tensions on the role of the Council toughened. China was one of the parties who maintained a strong stand on having a link between the crime of aggression and the Security Council as precondition for the inclusion of the crime under the Rome Statute[182]. The operation of the Court should not hamper the functions of the Council in the maintenance of peace and security and this reflects also the questions around the determination of an act of aggression.[183]

On 16 June 1998 Wang Guangya claimed that the Chinese government continued to support a fair and independent Court which should be free from any political influence. However, he also added that the Court should not either become a device to interfere in countries' internal affairs triggering political struggles. The main role of the UN particularly that of the Council should not be compromised in *safeguarding world peace and security* and the ICC Statute should not run-counter the provisions of UN Charter. "The conference should be prudent in dealing with the relationship between the ICC the UN and the role of the Security Council"[184].

When the PRC became UN member in 1972, it showed scepticism over the Council's powers in relation to aggression. China then gradually changed towards favouring the SC to hold primary in the determination of aggression. From Rome onwards it pushed on the role of the Security Council as precondition for the inclusion of the crime in the Rome statute. China believed that the power to refer cases to the ICC and to determine the existence of acts of aggression should fall within the Council's powers[185]. Only when agreement over the role of the SC in connection to the ICC over aggression[186] and over the definition of the crime was reached, then the crime could have been included in the Statute of the Court[187].

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182 See Statement by Li Yanduan (19 June 1998) Summary Record, 7th Meeting, A/ CONF.183/C.1/SR.7, para. 9

183 See Statement by Li Ting (22 June 1998), 10th meeting, A/CONF.183/C.1/SR.10, paras 84-85, available at https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2/a_conf183_c1_sr10.pdf accessed last on 16 november 2021. see also Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations New York 2002), A/CONR183/13 (Vol.II) available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf accessed on 18 November 2021. Zhu, D. (2015), *supra note 168,* p. 98;

184 General Statement at the UN Conference of Plenipotentiary on the Establishment of an International Criminal Court (ICC) by Mr. Wang Guangya Head of the Chinese Delegation https://www.legal-tools.org/doc/5b511e/pdf/

185 See Statement by Li Ting (22 June 1998), *supra note 183,* para 85.

186 See Statement by Li Yanduan (19 June 1998), *supra note 182,* para. 9

187 SeeStatement by Liu Daun (8 July 1998) Summary record of the 25th meeting, Committee of the Whole, Rome A/CONF.183/C.1/SR.25, para 34. available at

Mr Wang Guangya in one of his statements affirmed that the country held a cautious approach due to the uniqueness of the crime. However, leaving the task of determining aggression to the Court may result in the negative impact on the *image* (mian 面) that the country gives internationally putting at risk the country position in the development of international relations.[188]

With the closing of the Conference in Rome no agreement was reached for a generally accepted definition of the crime of aggression.

In voting against the adoption of the Statute, Mr Wang Guangya, in his role as head of the Chinese delegation, reaffirmed that aggression is a state act and no legal definition of the crime existed. The Security Council should determine the existence of aggression as for article 39 of the United Nations Charter before individual criminal responsibility could be triggered. This, he claimed, is to avoid political abuses in terms of litigation.[189]

4.4.2. A nearly exclusive filter and the search for consensus

Despite the negative vote in Rome, China continued to be involved actively in the development of the court and of the crime of aggression. It engaged with the efforts of the Preparatory Commission, participated as observer state at the Assembly of States Parties and at the works of the SWGCA and at the Kampala Review Conference[190].

China, however, never compromised its position and maintained that to trigger individual criminal liability the state has to commit an act of aggression and it is in the functions of the Security Council to determine that acts of aggression have occurred. Otherwise, individual responsibility cannot be ascertain or it would run counter the provisions of the Charter[191].

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https://digitallibrary.un.org/record/275964?ln=en#record-files-collapse-header accessed on 16 November 2021.

188 General Statement by Mr. Wang Guangya, *supra note 119.*

189 Original version 中国代表团对规约中有关安理会作用的规定特保留意见。 侵略罪是一**种国家行**为，且尚没有法律上的定义， 为防止政治上的滥诉， 在具体追究个人刑事责任之前安理会首先判定是否存 在着侵略 行为是必要的， “联合国宪章” 第 39 的规定 available at https://www.legal-tools.org/doc/bb0b03/pdf/ accessed on 16 November 2021. See 王光亚谈 “国际刑事法院规约”[Wang Guangya talks about the Statute of the International Criminal Court] (29 July 1998), *supra note 92.*

190 See Statements by Mr. Xu Hong, General Debate 8th session, Assembly of States Parties to the Rome Statute (20 November 2009). See also Delegations to the Review Conference Kampala 31 May - 11 June 2010, Doc. RC/INF.1 (26 August 2010).

191 See for instance China and the International Criminal Court (19 April 2004), in China's Work in the Legal Field of the United Nations, section VI available at https://www.mfa.gov.cn/ce/cegv//eng/gjhyfy/hflygz/t85684.htm accessed on 16 November 2021.

Within the efforts of the Preparatory Commission, certain states were suggesting a series of checks and balances to ensure that the Council carries out its function. Among the proposals, there were also ideas to give the GA or the ICJ responsibility to intervene when the Council fails to act within a certain period of time. On this, China responded reluctantly to the proposal submitted by Bosnia and Herzegovina, New Zealand and Romania (discussed in the previous Chapter) in 2001 aimed at giving the ICJ a role in the determination of a state act of aggression after a specific period of time allocated to the SC to take a decision. China reaffirmed its support for the establishment of the Court and its concerns on the issue of defining aggression. Determination of acts of aggression by the Court would spark political debates and it is not within the functions and mandate of the ICJ. The function of the ICJ is to give advisory opinions on legal questions. China was strictly firm in identifying the Security Council as sole actor upon which responsibility to determine acts of aggression rely[192]. These ideas run counter the provisions of the Charter[193]

No agreement was again reached at the Preparatory Commission. The work was handed over to the Assembly of State Parties (ASP) that held its first session on 3-10 September 2002[194] and then to the Special Working Group on the Crime of Aggression[195].

Discussions over the primary role of the SC in the determination of aggression as precondition for the Court's exercise of jurisdiction over aggression continued at the ASP meetings. China supported this view stressing on the provision of the UN Charter (Art. 24 and art 39) and on the fundamental mandate of the SC to maintain peace and security cardinal for an effective functioning of the system of collective security. Furthermore, the importance of the contribution of the Council in prosecuting aggression is also linked to the fact that once the Council has determined the existence of aggression, all member states, no just states parties, would be obliged to abide by its authority[196].

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192 See Statement by Qi Dahai, Establishment of the International Criminal Court, 25th meeting (12 November 2001) Sixth Committee, GA 56th session, Doc. A/C.6/56/SR.25, paras 56 – 59

193 See *supra note 191.*

194 See *First Session* (3 -10 September 2002) Assembly of States Parties, available at https://legal.un.org/icc/asp/aspfra.htm accessed on 16 November 2021.

195 Continuity of work in respect of the crime of aggression, Resolution ICC-ASP/1/Res.1 (ICC-ASP/1/Res.1) (9 September 2002)

196 See Zhu, D. (2015), *supra note 168,* p 101 citing Mr Wang Zonglai, Deputy Director-General of the Treat and Law Department at the Ministry of Foreign Affairs.

Common to the attitude of the other permanent members, every Chinese intervention reconfirmed the Chinese position on granting the Council a nearly exclusive determination-filter role (Interviewees 1 and 2).

At the meetings of the SWGCA debates over the definition of aggression continued. Major discussions navigated around the question of whether the new definition was to be based on the 1974 GA resolution. China was one of the countries that favoured reference to resolution 3314 in full, finding it already a successful compromise that resulted from not easy efforts and comprehensive considerations[197]. Reference to the 1974 resolution was eventually kept (see previous chapter for a more extensive analysis) but instead of re-using it in its entirety, some of its provisions were selected and others dropped.

The idea of adding a threshold clause was also on the negotiating table. The threshold options proposed were either to add that aggression or a war of aggression had the "object or result of establishing military occupation of, or annexing, the territory of another state or part thereof"[198] or, that its "character, gravity and scale constitute a manifest violation of the UN Charter."[199] The threshold clause was eventually necessary to reach consensus, and the latter version was adopted. In 2001, China confirmed that setting a threshold was indeed necessary and maintained the same attitude thereof[200].

4.4.3. *Limited capacities of an observer status: China's voice in Kampala*

China actively participated at the discussions of the Review Conference despite was not a State-party to the ICC, therefore without voting capacity.

On 11 June 2010 at the 13th Plenary meeting of the Review Conference of the Rome Statute of the ICC in Kampala adopted Resolution 6 (RC/Res-6) on the crime of aggression[201].

197 See Zhu, D. (2015), *supra note 168,* p. 109

198 Discussion paper on the crime of aggression proposed by the Chairman (Annex) (16 January 2007) ICC-ASP/5/SWGCA/2, 16 January 2007, pp. 3 - 5

199 See the Discussion paper on the crime of aggression proposed by the Chairman (16 January 2007), *supra note 198*, p. 3 section 1.

200 See Statement by Qi Dahai (12 November 2001) *supra note 192,* para 56

201 The Crime of Aggression, Resolution RC/Res.6, 13th meeting (11 June 2010), Doc. RC/11.

The Kampala amendments did not grant the SC the role that China wished in relation to the crime of aggression.[202] The final definition in Kampala dropped article 2 and 4 of the GA 3314 Resolution and included the manifest threshold clause in article 8bis[203].

Despite in 1974 China raised criticism over article 2 and 4 of the definition of aggression as annexed to the GA resolution 3314 (XXIX), thirty-six years later China remained solid in its position that the definition of the crime of aggression had to make full reference to the 1974 definition and did not agree with dropping the two articles.

This contradictory stand is very much linked to the role of the Council in the determination of acts of aggression. China considers the definition of aggression and jurisdictional conditions as interrelated.

Such approach mutated throughout the development of the crime along with the changes in the status of China as new international power.

From being sceptical in relation to the UN system and the hierarchy the Council entailed, China's growing role in the international sphere brought China to rely more and more on the Charter of the United Nations and find it legitimate.

The change of attitude was very clear also at the ASP meetings, where China requested that the definition of aggression mirrored that annexed to GA resolution 3314 (1974). This was completely in contrast with the criticism raised in the 1970s after acceding to the UN, when China did not want to vote in favour of resolution 3314 because it was too vague and in breach of principle of legality. In Kampala, only the limited capacity China had, being an observer state, kept her from pushing more and gaining the results that could have been more in line with its interests.

Zhou Lulu, diplomat and active member of the Chinese delegation at various stages of the development of the crime, believed that the Kampala amendments did not manage to address the various controversies over the crime. He considers those amendments to threaten international peace and security rather than preserve it if those provisions are to be used to prosecute perpetrators.[204]

Despite the amendments on the crime of aggression has, to a certain degree, addressed some of China's concerns - take for instance the state opt-out mechanism (Art. 15Bis(4), Council's

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[202] See Article 15*bis*(7) and (8), Rome Statute.

[203] See Article 8*bis,* Rome Statute

[204] Zhou, L. (2016) China. in Kress, C, and Barriga, S. (eds) (2016) The crime of aggression: A commentary. Cambridge University Press. p. 1131

jurisdictional filter (Art. 15bis(7)) or the pre-trial chamber authorization on the *proprio motu* power (Art. 15Bis(8)) - there is however dissatisfaction in relation to the exclusivity of the role of the Security Council in accordance with the provisions of the Charter and to the definition of the crime of aggression.

The peculiarity of the crime of aggression is that it creates a bonding tie between individual criminal responsibility and state responsibility. As Zhu Dan explains, individual guilt for crimes committed in official capacity within the policy of a state implies an "*obiter dictum* as to state responsibility".[205] This aspect touches directly upon Chinese focal points: state sovereignty, territorial integrity, non-interference and maintenance of peace and security.

Interesting shift was also to see China repeatedly justifying its decisions on the basis of state sovereignty and non-intervention, and gradually to relate them mostly to the maintenance of peace and security as major basis for its decisions.

China's focus on peace, security and development and consistent attitude in relation to the role of the Security Council have gone hand in hand in the past decade with an increase attention towards a UN-centred global system of governance[206].

5. Conclusion

This chapter outlines the Chinese engagement throughout the historical substantive development of the crime of aggression and its attitude towards the preservation of international peace and security in relation to, or through, justice.

China has steadily supported the advancement of international criminal justice together with the establishment of a permanent international judicial body to prosecute grave crimes and has proactively participated at the various stages of the codification and development of the

[205] Zhu, D. (2018), *supra note 10,* p. 152 citing Triffterer, O. (1996) Prosecution of States for Crimes of State, (International Review of Penal Law, 67), p. 346.

[206] See China's focus on peace, security and development and consistent attitude in relation to the role of the Security Council and increase attention towards a UN-centered global system of governance in each China's Position Paper from the 63rd Session of the UN General Assembly (16 September 2008), Premier Wenjiabao attends 63rd GA Session, in mfa.gov.cn, available at https://www.mfa.gov.cn/ce/ceun//eng/zt/63ga_premier_wjb/t512988.htm accessed on 16 November 2021 to the 75th session (of the United Nations General Assembly (10 September 2020) available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1813751.shtml accessed on 16 November 1975.

crime. However, China has also expressed reservations and setbacks linked to the definition of the crime and the position of the Security Council.

The Chinese attitude unfolded among controversies. China has repeatedly stressed that it is fundamental that the Court preserves its independence and impartiality but urges to subordinate such an independent court to the authority of the Security Council. This inclination grows even more when questions of aggression are at stake.

The crime of aggression under the jurisdiction of an international criminal court is like a void in which the dichotomy maintenance of peace and security and the pursuit of justice fall in an endless battle and where the roles of the Security Council and the ICC encroach. Understanding this allows to embrace the controversies and challenges that the codification and application of such a complex crime entail. However, in 2010 the Kampala consensus decision over aggression that concludes decades of works and negotiations managed to find a compromise that encompasses both the idea of crimes against peace depicting Japan's actions in China in WWII and the necessary elements for international criminal justice to find its application against aggressive wars today.

The process that led to this result took nearly a century-long journey in sensitive waters. In this process China demonstrated constant participation and engagement but a *quasi*-inconsistent attitude, apparently vulnerable to internal and international changes that seems to reflect the country normative preferences and political interests. Undoubtedly, for China is essential to maintain a strategic position internationally also in relation to the politico-military challenges it faces.

It is also clear that China retains a high degree of responsibility when it come to the maintenance of global peace and security being a permanent member of the Security Council and how this may have shaped certain aspects of its attitude. Furthermore, China has traditionally been a strong supporter of the principles of state sovereignty and non-interference in other's states internal affairs and promotes the five principles of peaceful coexistence as basis for the country foreign policy.

However, the Chinese position seems to hold beyond this rationale through a different understanding of such a dichotomy. There are certain situations in which peace and justice go hand in hand, they run in parallel. Yet, in many cases peace, security and justice collide. This recalls some of the dynamics that challenged the Allied powers at the end of World War II. In such a complex and unique situation, criminal justice properly understood would have

limited long-term peace and stability. The outcome of those military tribunals had a strategic well-thought aim. This is how many have justified the controversies of those times. Similarly, China seems to align with this attitude prioritizing the maintenance of peace and security, which responsibility lies within the role and the functions of the Security Council, over the pursuit of justice.

In 2012, at a Security Council's meeting on the promotion and strengthening of the rule of law in the maintenance of international peace and security, discussions over peace and justice, with a special focus on the role of the International Criminal Court, were the main features of the meeting.

Li Baodong, from China, stated:

"China believes that justice cannot be pursued at the expenses of peaceful process, nor should it impede the process of national reconciliation. [... The ICC] must abide by the purposes and principles of the Charter and play a positive role in maintaining international peace and security. […] the Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security"[207]

The country attitude may reflect Chinese inclination in the dichotomy of justice and maintenance of international peace and security shaped within a three-dimensional sphere that includes culture and tradition making it all be part of the Chinese identity.

[207] Statement by Mr. Li Baodong (17 October 2012) 6849th meeting, Security Council, S/PV.6849. p. 12

CHAPTER IV

From Takashi Sakai to Kampala. China through the looking glass of the dichotomy justice and maintenance of peace and security

1. China's behaviour in the development of the crime of aggression: Peace or Justice?

Drawing from the analysis that this research has so far undertaken, China has embraced the international criminal justice experience as part of the larger project of peace and collective security born out of the two world wars. The country has throughout the decades demonstrated a consistent participation and support to the development of international criminal law and the establishment of international criminal courts. As well, it showed commitment for the codification of the crimes therein, and persistency in the lengthy evolution of the crime of aggression.

In this historical legal journey, it is possible to discern a consistent attitude of the PRC for what concerns the state attendance and representation at the various forums. Such attitude endured the handover from the Republic of China (ROC) to the People's Republic of China (PRC). However, the country has also demonstrated a degree of incoherence when dealing with certain sensitive issues as found in the previous chapter. This seemed to respond to the country policy preferences.

The analysis so far undertaken does not hide a predisposition in the country behaviour to prioritize the restoration and maintenance of peace and security in the development of international criminal law.

As dichotomy that has shaped the whole research, it is by now clear that justice and peace represent two dimensions that can coexist and mutually contribute as much as conflict. The United Nations encapsulate them both. Institutional emblem to the achievement of international peace and cooperation, the UN is mandated with maintaining peace and security. Justice is an essential element of peace, conducive to live up to the mandate and the provisions of the Charter.

The status as permanent member of the Security Council grants China special responsibilities in the maintenance of international peace and security. The predisposition that the country has featured towards peace and security seems to align with the priorities of the Security Council and the responsibilities that its role entails. Emphasis on peace and stability however were persistent part of the China’s external policy.

China openly advertised this inclination through the repetitive adoption of specific tautological terminology that conceptualized the Chinese public discourse. Over the decades

speeches and written forms of communications have been articulated around the expressions *peaceful rise*, *peaceful development, harmonious world* and *world peace*[1].

One recent instance is the speech held by Mr Wang Yi, State Councillor and Foreign Minister of The People's Republic of China in May 2021, at the United Nations Security Council High-level Meeting on *Maintenance of International Peace and Security: Upholding Multilateralism and the United Nations-centred International System.* He insisted on the importance of world peace as key priority and fundamental value at which the global community should aspire. He praised the value of multilateralism as essential apparatus through which it should be pursued, and he was keen to reassure that China does not seek hegemony but wants harmony[2]. Emphasis was also placed on the importance to uphold the primary functions and responsibility of the United Nations and to address hot-spot issues through political means so to reach the ultimate aim, world peace and stability[3].

Yet, China's rationale for peace and security seems to imply a rather narrow notion of peace compared to the concept of liberal peace that is normally part of the global governance discourse. Within the meaning of Chinese peace there is order, stability, cooperation, and mutual benefit, but it seems to forgo, or forget, other features.

Two questions result from these considerations. *Why* and *how* the predisposition on the maintenance of peace and security over the pursuit of justice that seems to characterise the Chinese attitude *take effect*?

China's commitment to the restoration and maintenance of peace and security and its growing engagement in multilateralism stems from a series of political, economic, and cultural elements that are intrinsically interrelated.

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1 China tends to express its position in foreign policy frameworks in a rather repetitive and standardized form. From white papers, to speeches, to a wide variety of policy records and sites that convey official thinking available in English in official or semi-official websites (i.e. the website of the Chinese ministry of foreign affairs or Xinhua.net) meant for external use the Chinese attitude puts emphasis in the goodwill of the country, peaceful intentions and alignment with democratic multilateralism and principles of global governance as fostered by the international community. This shows the importance that China attributes to the the image the country gives in international public diplomacy and its international normative position – and to a certain degree influences China's *opinio iuris* in international law -.

2 See Remarks by H.E. Wang Yi (7 May 2021) United Nations Security Council High-level Meeting "Maintenance of International Peace and Security: Upholding Multilateralism and the United Nations-centered International System". Available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202105/t20210508_9170544.html accessed on 6 January 2021.

3 Ibid.

Peace, order and stability expressed in terms of social harmony and benevolence are part of the Chinese tradition since its very ancient time. Yet, they are also part of the country identity today and evolve around three cardinal pillars: sovereignty, security and development.

1.1. *National sovereignty and the Five Principles of Peaceful Coexistence*

The preservation of national sovereignty is the leading concern that China has raised throughout the development of international criminal law. This *anxiety* was loudly voiced at the relevant forums such as within the Security Council at the time of the establishment of the ICTY and ICTR *ad hoc* tribunals, at the Rome Conference in 1998, at the Security Council meetings concerning the ICC, in Kampala, and in most of the negotiations for the codification of the crime of aggression more broadly. The prioritization of national sovereignty and the country fixed policy of non-interference in internal affairs have been the country *carte de visite*. They are the fundamental aspects of the PRC foreign policy and international legal discourse.

The Chinese conception of state sovereignty, in Chinese characters 主权 *zhuquan,* denote an intrinsic disinclination towards the idea of interference in those aspects that the government considers internal affairs of a nation other than its own.

This interpretation is conceptualized in the Five Principles of Peaceful Coexistence. Drafted and affirmed in the Sino-Indian Agreement on Trade in 1954, they have become the guiding principles of Chinese diplomacy. Accordingly, sovereignty is paramount to the other principles, as Muller (2013) observes, it is construed as "reciprocal" and of "mutual respect"[4]. This means that as other states respect *our* sovereignty *we* respect theirs. The Chinese government has endeavoured to incorporate these principles in treaties, agreements, and all sorts of declarations.

It is undeniable that such a strong zeal for sovereignty dates back to the century of humiliation that has historically affected the country and functioned as catalyst of a fervent preventive policy against any form of external interference. The importance that China gives to the preservation of sovereignty can indeed be understood with reference to history. As illustrated in the previous chapters, China was introduced to the concept of sovereignty when

[4] Muller, W. (2013). Beyond history and sovereignty: China and the future of international law. European University Institute. P. 58

western powers invaded the country in the 19th century. Two opposed models of world order clashed, and China had no choice but to *re-form* on that new system that the western invaders brought with them. The Qing started to adopt the notion of sovereignty as a European Westphalian term so to make use of it as defence measure against foreign invasions under the claim of the right of sovereign equality. Not effective at first, it became an essential tool of defence and one of the few ROC heritages that the PRC welcomed and invoked by means of the Five Principles of Peaceful Coexistence.

Moving on with history, as Kent (2007) has managed to clearly draw, in the years before the official accession to the United Nations, the Chinese segregation out of the international discourse led China's foreign policy to "*shrink into a narrow and self-regarding preoccupation with ideological issues and Cold War competition, heavily coloured by its paranoia about containment and encirclement, through which its perceptions of the outside world were distorted and refracted".*[5] When the PRC was eventually accepted as official representative of China at the UN, it was extremely sceptical towards the practices of the new organization. Major sources of scepticism were the close relation that the ROC had with the United Nations being one of the founders of the institution, and the American influence in the practices of the UN. To the PRC eyes, these two aspects made the UN a supranational body created for the benefits of its own architects. As an outsider with such a strong suspicion and distrust, the Five Principles of Peaceful Coexistence served as defensive wall against any potential interference from western or supranational forces while projecting to the global community the image of a responsible power.

In the 1980s China entered a period of revival thanks to Deng Xiaoping's policy of reform and open-up that led the country to a fast-paced economic growth and increasing relevance at the international level.

China has since stressed even more on the Five Principles, included also in the 1982 Chinese Constitution. Today they are considered major pillars of the country's foreign policy.

In 2004, Premier Wen Jiabao held a public speech to commemorate the 50th anniversary of the Five Principles, painted as *basic norms governing international relations* and considered of *monumental contribution* to the maintenance of peace and security.[6]

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[5] Kent, A. (2007) Beyond Compliance: China, International Organizations, and Global Security. Stanford, Stanford University Press. p. 44. Also cited in Muller, W. (2013), *supra note 5,* p. 60-61

[6] See Speech by Wen Jiabao Premier of the State Council of the People's Republic of China (28 June 2004) Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development,

Ten years later, in June 2014, at the sixtieth anniversary of the Five Principles, an analogous speech was addressed by PRC President Xi Jinping. The different historical and geopolitical contexts in which the two speeches took place, they both evenly embraced the notions of peace and harmony as essential foundation for win-win cooperation and robust international relations. Peace and harmony were depicted not only as the guiding policy of China but as the inherent feature of all Asian countries. Expressions such as *loving peace*, *peace is most precious*, *harmony without uniformity*, *peace among all nations* and *universal love and non-aggression* were all part of them. Xi Jinping's speech concluded with the announcement of the establishment of a *Five Principles of Peaceful Coexistence Friendship Award* and *Scholarship of Excellence*[7].

The importance that China attributes to sovereignty is very much associated to the scope of legitimacy that the Government and the Chinese Communist Party want to secure. The party-state legitimacy is built upon economic growth, development, order and stability. As Muller (2013) notices, the struggles that the Chinese government has undertaken in the past decades to retain its legitimacy shows similarities to those that Chinese imperial dynasties had traditionally faced. [8] According to ancient Chinese history, the *Mandate of Heaven* conceptualized the belief that there could be only one ruler to govern China whose authority was legitimate by a divine mandate. Like the emperors, the government wants legitimacy and unity under one single mandate, that of the CCP-PRC as single entity.

Understanding the importance that the Chinese government attributes to the *legitimacy and integrity of the empire* helps to understand the significance it gives to sovereignty. This also responds to the severe approach against dissident voices and separatist feelings, justifying the reluctance to be subjected to scrutiny.

Internal legitimacy is to be built taking into account the position that a state like China holds as member of the international community and on the interdependency of mutual relations it creates. China is aware that it needs to engage with the global community and is willing to do so. However, it also carries a double identity as global power and a leading developing

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Rally Commemorating the 50th Anniversary of The Five Principles of Peaceful Coexistence. Available at https://www.mfa.gov.cn/ce/cetur//eng/xwdt/t140777.htm accessed on 6 January 2022.

7 See Address by President Xi Jinping (28 June 2014) Carry forward the Five Principles of Peaceful Coexistence to build a better world through win-win cooperation, Meeting Marking the 60th Anniversary Of the Initiation of the Five Principles of Peaceful Coexistence. Available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201407/t20140701_678184.html accessed on 6 January 2022.

8 Muller, W. (2013), *supra note 4*, p. 160

country. To be a global power means visibility and capacity to uphold the responsibilities that result from it. Concurrently, it also means to be able to guarantee domestic development, economic growth and security in a reality that counts for the world largest population. On the other hand, as other developing countries that had historically been victims of western colonialism and are still cynical in relation to western hegemonic attitude, China believes that domestic stability and security can be preserved only with the acquisition of full sovereignty against western-dominated world and supranational bodies which are nonetheless western products[9].

To reintroduce this analysis in the rationale of this research, an international criminal court may translate into a source of scrutiny and threat against the sovereignty of a country. State consent and the principle of complementary are two mechanism that have been created to address this issue and avoid any risk of infringement upon the country sovereignty. However, the way they are implemented and the degree of politics that are normally part of international relations may make them flawed. For a country like China, to engage with an international judicial body such as the ICC may therefore become risky. As Dan Zhu asserts, *any global governance arrangement that challenges the traditional notion of state national sovereignty might be difficult for China to embrace*[10].

The peculiarities of the crime of aggression further magnify this risk. The bonding tie it creates between state responsibility and individual criminal liability attributed to an individual acting in official capacity within the policy of the state generate too many elements that may infringe on sovereignty. It is a direct interference at the high vertices.

China is not ready to lose that degree of control over its domestic affairs, because it is not yet ready to secure its legitimacy without it. Perceived legitimacy justifies the authority to rule and use coercive measures. When people perceive their authority as legitimate, it is more likely that they feel compelled to obey. Without legitimacy, nothing may support the ruling of the authority and its acceptance.

1.2. *From international to internal security: Power-politics and role-play*

[9] See Xinyu, Y. (2020). Chinese Pathways to Peacebuilding: From Historical Legacies to Contemporary Practices. Пути к миру и безопасности, (1 (58)), 26-45. p. 33

[10] Cit. Zhu, D. (2018). China and the International Criminal Court. Palgrave Macmillan. Springer. p. 280

Explicit features that emerged from this outline on the country's behaviour are the importance that China attributes to its role as permanent member of the Security Council and the support to the Council as primary organ responsible to maintain peace and security. Any action that could impact on issues of peace and security without approval or authorization of the Council would receive a Chinese dissent.

China is one of the five permanent members of the Security Council. It holds special responsibilities to uphold the provisions of the Charter of the United Nations, primary the maintenance of international peace and security. The special powers and duties of this position have shaped many aspects of the country attitude.

China is clearly committed to preserve its authority as member of the Council. This approach reflects the preference of a superpower to preserve its status while acting as responsible actor that contributes to the existing international order.

Preserving a form of authority inside the Council has direct consequences in the preservation of the internal stability of the country. The veto power is a tool of control and decision making in relation to the mechanisms that develop internationally and it can filter the degree and type of impact that those mechanisms can have at the domestic level. Being a responsible power that also fulfils its responsibilities as P5 it conveys to the global community the image of legitimate leadership. Internal stability and external responsible attitude favour legitimacy both internationally and internally, essential for stable relations and order. Indeed, legitimacy is not only key to internal ruling but it is also key to stable power relations.

In a centralised system such as that of China, governments legitimacy is measured in terms of collective interests, and the stability and prosperity that the government can guarantee to its population.

1.3. *The development goal*

Without economic growth and domestic balance there would not be great China.[11]

Socio-economic development is intrinsic to China' s internal stability, peace, and security. The Chinese expression 安全是发展的前提，发展是安全的保障 (Ānquán shì fāzhǎn de qiántí, fāzhǎn shì ānquán de bǎozhàng) is a known expression in Chinese foreign policy

[11] See Kim, H. (2007) On China's internal Stability 2nd Berlin Conference on Asian Security. Berlin. Stiftung Wissenschaft und Politik

discourse that means security *is the precondition for development, development is safeguard to security*[12].

China's increasing discourse and engagement with the maintenance of international peace and security stems from its desire to foster economic growth and development. Without a favourable context, economy and development would not have fertile ground to flourish.

This has led the Chinese leadership to engage in a foreign policy of peace and cooperation to find a balance between national development and participation in a multipolar global society. A *"peaceful international environment benefits one's own development that contributes to world peace through one's own development*".[13]

The position that China took in relation to the deferral of the situation in Darfur (Security Council resolution 1593, 2005)[14] reflects well Chinese approach to the maintenance of peace and security. As China asserted in that occasion, it was "*an inappropriate decision made at an inappropriate time"*.[15] China pragmatic approach filters situations in which retributive justice could be more detrimental than beneficial. Retribution as dispute settlement and post-conflict reconstruction mechanism may result into undesirable repercussions to the Chinese interests. Fragile conditions of peace and security pose significant risks to Chinese economic engagement with certain countries, such as in the case of Darfur[16]. Peace and security amongst the parties involved could favour internal dynamics both for China and for the African country. Without a peaceful and secure environment, the Chinese engagement with the African stakeholders may be of detriment to development, economic growth, stability. This situation delineates some Chinese features as leading developing country which stands in solidarity with other developing countries. It also delineates some aspects of a responsible Council member that uphold the final mandate of the UN.

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12 人民日报评论员：坚持统筹发展和安全——论学习贯彻党的十九届五中全会精神 (2020-11-04). available at http://www.xinhuanet.com/2020-11/04/c_1126698536.htm accessed on 09 January 2022. See also 坚持统筹发展和安全 (10 Dec 2020) available at http://www.xinhuanet.com/politics/2020-12/10/c_1126844201.htm accessed on 09 January 2022.

13 Dai, B. (2012) Asia, China and International Law, Editorial Comments, Oxford University Press. p. 2

14 Security Council Resolution 1593 (2005) 5158th meeting, S/RES/1593 (2005)

15 Xiao, J. Zhang, X. (2013) A Realist Perspective on China and the International Criminal Court (FICHL Policy Brief Series No. 13) Oslo: TOAEP, p. 1.

16 Van Tuijl, P. and Van Dorp, J. (2016) How is China Supporting Peace and Development? Global Partnership for the Prevention of Armed Conflict (GPPAC)1 Changing Landscape of Assistance to Conflict-Affected States: Emerging and Traditional Donors and Opportunities for Collaboration Policy Brief #2 Policy brief series edited by Agnieszka Paczynska, School for Conflict Analysis and Resolution, George Mason University/Stimson Centre. p. 6

1.4. *Observations*

The core interests and priorities of the Chinese government belong primarily to national affairs. These priorities gravitate around three cardinal dimensions namely sovereignty, security and development and lie at the basis of the Chinese foreign policy. This three-dimensional peace approach evolved to a large extent from China's historical experience of initial submission to a bitter and hostile international system dominated by western imperialism identified as the *century of national humiliation.*

China identifies the time before western invasion as a time of enduring peace and order that for centuries extended to the whole East Asian region, a system China recognises as based on harmony, cooperation, mutual benefit and shared norms, but *de facto* modelled on a *quasi*-feudal order based upon tributary hierarchical relations, as illustrated in the third chapter. It was a different non-western form of imperial system that was forcibly incorporated in the Westphalian order. After a century of disorder and victimhood, the initial response was that of full commitment to the international community under the ROC aimed at a gradual reintegration in the global order on equal feet. This was followed by an early wave of strong scepticism and critic by the PRC towards the United Nations and the international community until full representation as official member of the United Nations, and the subsequent shift in the country diplomatic approach. Since 1978 focus was put on economic growth and non-interference carried out with peaceful intentions. The growing Chinese position at the international level went hand in hand with a growing emphasis on the concepts of harmonious society and peaceful development. The peace rhetoric is useful to China's foreign relation. China's new diplomacy that increasingly converged on preserving sovereignty, development and internal stability can be understood as motivated by the need to ensure internal stability. This is complementary to safeguard the legitimacy of the authorities while projecting to the world the image of a peaceful country and responsible power. The more powerful and the more legitimate it becomes, the more influence and control it can exercise to internal stability and party-state legitimacy.

2. **Where does culture fall?**

To which degree this preference for peace is justified by culture?

The cultural dimension of a country is one of the many extra legal factors that can mirror the inherent rationale behind the attitude that the country decides to adopts.

In ancient China, order and stability based on the dictates of Confucian harmony lied at the foundation of imperial policies and practices. As least internally, the maintenance of peace and stability was necessary to rule a vast territory such as that of the unified Chinese empire. Confucian principles of peaceful and harmonious society, as much as Mohist and Legalist ideals of non-aggression, defence and order, evolved into codes and schemes upon which the system was built to ensure social order and control. Confucian principles permeated every layer of the society and everyday activities. Harmony was for instance professed also in rice cultivation. Peace and harmony were normalised aspects of the society, despite war and conflicts were also part of it[17].

Chinese language has two ways that can be used that carry the meaning of peace. 和平 *heping,* composed of *he* 和 that stands for *kind, harmonious, mild, together* and *ping* 平 that stands for *even, equal, pair, quiet*. A second term 安 *an* also denotes peace but with an accepted meaning that leans more towards safety and security. Harmony, order and security were the essence of Chinese traditional peace and the essence of the Chinese leadership discourse today. The notions of harmony and peace were, and are, instrumental to order and stability and therefore to safety and security. The core of such a Confucian ethos, can be extracted from the words of the 大學 dàxué, translated as the Great Learning, a Confucian Classic:

知止而后有定、 定而后能靜 【。。。】身脩而后家齊。 家齊而后國治。國治而后天下平。 自天子以至於庶人、壹是皆以脩身爲本。其本亂而末治者、否矣。其所厚者薄、而其所薄者厚、未之有也。此謂知本、此謂知之至也。[18]

When you know where to stop, you have stability. When you have stability, you can be calm. [...]
When the self is cultivated, the group is harmonized. When the group is harmonized, the country is well governed. When the country is well governed, there will be peace. From the Son of Heaven to the common people, all must regard cultivation of the personal life as the essence. That the essence is in disorder and yet the realm in order is not possible.

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17 See Adolf, A. (2009). Peace: a world history. Polity. p. 63

18 For the full text with translation please see Muller, C. A. (1992). The Great Learning 大學 available at http://www.acmuller.net/con-dao/greatlearning.html acceded on 10 January 2022.

Peace, unity, and stability depended on the relationship between internal stability and external conditions. They were only possible if the authority shared the same values of the people.

Those values however, were not only intrinsically part of the culture but they have often been politically instrumental to the government. The anti-war Confucian and Mohist ideal and the institutional arrangements that ensued from it have historically been functional to generate a feeling of collectivity among the population and in relation to the neighbouring countries that normalised in people's behaviours.

Despite a similar attitude had been reproduced domestically in contemporary China, the same cannot be said in relation to international dynamics. Today the Chinese authorities use culture to control domestic dynamics and to advocate for a new international order. The Chinese leadership is keen in fostering a peace-loving culture that upholds its political tradition, but it promotes cooperation among nations rather than subordination and hierarchy. Harmony and stability were therefore part of traditional China as much as contemporary one. The difference though, comes from the limits that the association of these two values entails. In the sinocentric world order upon which imperial China functioned, the powers of the emperor expressed through the dictates of harmony and stability did not see borders. The supremacy of the Chinese empire over the foreign neighbouring countries worked through hierarchical subordination, it did not have to handle threats of interference and total subversion based on power-politics. Today the external environment is not subordinated to the Chinese empire. The international order is not sinocentric and China's authority is not unlimited nor borderless. Today's global community is made of sovereign states, great and minor powers and supranational bodies for whom those borders need to be made almost impermeable. The weight that sovereignty, integrity and non-interference have gain since its presence in the global scene is proportional to the importance the government gives to political and social order so to preserve a status quo. Collective harmony is the key to social stability.

China reluctance to war and predisposition towards peace is not only linked to matters of stability and legitimacy, but it is also part of the inherent cultural philosophical tradition.

It is a tradition *per se* utilitarian that characterizes almost all the spheres of analysis.

2.1. *Justice with Chinese characteristics: a different expression.*

The analysis that is unfolding in this chapter has disclosed a degree of systematic instrumentalization of many spheres of action that may serve the purposes of the Chinese leadership.

This cannot be less true in relation to justice and its administration. Justice is used as an apparatus that permeates the whole legal system to allow the authority to achieve its aims. It is expressed to convey order and to shape social attitudes, so that the people can accept the leadership agenda. It reflects the mechanisms that certain systems generate to regulate social dynamics and individual behaviour and serves as vehicles to build a certain vision and understanding of the law and the authority[19].

This mirrors the way the Chinese seems to understand and use the normative framework upon which the Chinese legal system is built. To create a parallelism with the rule *of* law, the Chinese approach would be that of rule *by* law.

As briefly highlighted in the third chapter, judges do not have to be independent voices but have to comply with state policies. Courts and judges are part of that larger mechanism through which constructed images of the law and the leadership convey in support of the legal-political agenda of the PRC.

As for Imperial China the emperor was vested with supreme legislative, judicial and executive powers, and the law was a tool to preserve and legitimate the Emperor's power and to maintain order. This approach depicts the justice system as an instrumentalised system for ideological purposes.

In the dichotomy justice and maintenance of peace and security, an inclination towards the latter could reflect an understanding of justice as performative and accessorial value. China's rationale for peace and security that seems to imply a rather narrow notion of peace hinted above, does not actually leave out the justice element but assign to it a different value. This can be exemplified through the link that exists between this reasoning and the three pillars around which the Chinese policy of peace and security gravitates. Since the launch of the *reform and opening up policy* in 1978, the PRC has endeavoured to fill the void in which the Chinese society has historically sank. Poverty reduction, social stability, stable political

[19] Extensive academic research has been published on the capacity of justice social mechanism instrumental to regulate behaviour and convey messages, or in other words the instrumental expression of justice. See for instance Garland W. D., Sustain, C. R., McAdams, H. R. to name a few. See also Sapio, F., Trevaskes, S., Biddulph, S., & Nesossi, E. (2017). Justice: the China experience. Cambridge University Press.

representation, economic growth and development are all successes that the country has undergone in the last five decades. This is the way the PRC interprets and measures the delivery of justice. Justice is what the nation deserves as a collectivity that as a consequence echoes on individuals. The delivery of financial and social stability to the population to guarantee wealth and security for all convert the authority into a justice provider. As justice provider the government is also legitimate.

These mechanisms though function at the expenses of civil and political rights. It is inherent to the Chinese system to forgo individual civil and political rights - as for the western understanding. The Chinese logic around which the idea of justice is built needs the political sphere to be free from interferences.

In a nutshell, as Sapio (2017) also explain, the party-state notion of justice shapes people's value through rhetoric and frameworks that function as devices to govern, oversight and respond to socio-economic needs and changes. Justice bodies and relevant institutions operate on the basis of the government rhetoric and uphold the political choices that are perceived to be made with the ultimate aim being the protection and improvement of the well-being of the individuals within the society.[20] This embodies the association of leniency, punishment and severity as touched upon in chapter 3 that shaped criminal processes in the Mao era and is employed in the current party-policies of criminal justice. Indeed, the rhetoric that the leadership has been using to address the justice discourse tends to merge more and more Maoist dictates with Confucian, Mohist and Legalist dogmas. It appears to be a combination of repressive propaganda dressed up with moral clothes of righteousness, harmony, peace and filial piety or in other words respect for the authorities and therefore legitimacy.

To look at the way China administers justice through an European liberal lens would most likely be perceived as expression of a non-liberal design that can function only in association to state power. This may considered the quintessential cultural western bias. State power and politics are themselves to be understood differently as differently is to be interpreted their relationship to justice. To understand the dynamics behind the Chinese expression of justice, politics have to be seen not as interfering with justice, but as *encompassing a range of social relations and processes*[21] holding onto the authority and the leadership. Justice has to be

[20] Sapio, F., Trevaskes, S., Biddulph, S., & Nesossi, E. (2017). The expression of justice in China. Cambridge University Press, p. 12

[21] Ibid. p. 5

consistent with the priorities of the state: economic growth, development goals and internal stability. It is not a moral concept and does not function upon it. This responds also to the question of individual rights versus community rights. The Chinese tradition is not inclined to have the individual as primary target of its policies because the common good is paramount. Once collective wellbeing is guaranteed the individual would benefit from it. This also reflects the Chinese behaviour at the international level in its reluctance to accept individuals as holders of international legal personality. The proposition that individuals are subjects of international law was born with Nuremberg and Tokyo and developed in the paradigms of international criminal law and human rights law. This is part of some of the controversies that China faces in relation to, besides others, international criminal law and for the above-mentioned reasons even more with the crime of aggression.
Justice and political choices favour the individual as community entity, not as a single.

3. How does China handle international institutions?

China is a multifaceted player when it comes to international organizations.
Two key words reflect China practice with international institutions: cautiousness and preservation. Preservation of international order, preservation of the provisions of the Charter and the role of the Council, preservation of an international image as a responsible and active player, preservation of its growing status as global power, preservation of its internal affairs and stability. Cautiousness lies in any engagement and is conducive to preservation.
China has increasingly engaged with international institutions. Yet, it has consistently demonstrated various forms of rejection to any sort of internal scrutiny. This has not prevented China from aligning with international bodies, including adjudicative ones and be part of global governance mechanisms. However, its engagement varies according to the nature of the institutions involved. Exposure is by now conventional for economic, financial and technical matters, while reluctance is characteristic to political, military or judicial spheres. The PRC attitude towards the ICC reflects this approach. It is not surprising that China's reasons not to accede the ICC gravitate mainly around these features. The Court jurisdiction is not based on absolute voluntary acceptance, it applies also in times of peace, and the implementation of the principle of complementary has led China to grow

reservations about it. China considers universal and/or compulsory jurisdiction to be antithetical to the preservation of the principle of sovereignty.

China needs international institutions and knows that the global community needs China to engage with them. As Anne Kent (2007) asserts, to achieve global prosperity and security the global community, made of liberal or non-liberal nations, has to engage and integrate as a group.[22]

3.1. *Multilateralism with Chinese characteristics*

Multilateral institutions operate to organize security and global economy within a structured framework and to facilitate cooperation among international actors. Politics are a constitutive element of this framework.

In endorsing multilateralism, looking simply at the Chinese attitude before the ICC and the crime of aggression as illustrated in this research, China has demonstrated to be active in voicing its opinions but strict in avoiding constraints and certain binding rules.

It seems to be applying a *pick and choose* approach to cooperation and multilateral commitment. Some scholars identify it as *selective multilateralism* [23] . *Selective multilateralism* means that in cases in which China prefers to engage in unilateral or bilateral negotiation, it would eagerly avoid any form of multilateralism, and vice-versa. The choice is mostly related to ultimate domestic interests. China seems therefore to stand by the definition that Keohane (1990) gives to the notion of multilateralism, "*the practice of co-ordinating national policies in groups of three or more states through ad hoc arrangements or by means of institutions".*[24]

As leading developing country as well as rising superpower with the largest world population to which the government has to guarantee security and stability, China does not want to be bound by a further multilateral mechanism that may interfere or restrict the country domestic and foreign policy. Yet, multilateral cooperation benefits all the parties involved and *is an effective tool in the maintenance of peace and security.* This is true not only because joint coordinated efforts facilitate the accomplishment of certain objectives, but also because

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22 Kent, A. (2007), *supra note 5,* p. 252

23 See Van Tuijl, P. and Van Dorp, J. (2016), *supra note 15.* p. 2

24 Cit. Keohane, R. O. (1990). Multilateralism: An Agenda for Research. International Journal, 45(4), 731–764. p. 731.

when it comes to strong nations like China, looking at its share of global wealth and the increasing international influence it plays, multilateral commitment and contribution to the global good, may reduce the tendency of other countries to constrain it. It is an important benefit both for the strong player and for the international community in general[25].

In this multilateral system, not only China has engaged with international institutions, but it has also created and shaped multilateral bodies and frameworks proving its commitment to multilateralism and contribution to global good[26]. The creation of multilateral institutions seems to reveal a Chinese tendency to shape global order in a way closer to China's foreign policy interests. As Feltman (2020) has drawn from his analysis, differently from the other nations that may overvalue or undervalue multilateralism, China seeks to change it.[27]

While in the relationship with international multilateral bodies China uses a selective approach, within these bodies China seems to apply what can be identified as political model of cooperation[28]. China's participation in the Security Council often reflects an interest in maintaining positive relations based on mutual support with the parties involved. Even if China may have or may have not supported a specific proposal, the decision to align with the other members, or one of the members with whom it shares a political strategy/strategic policy, reflects the choice to privilege such ties for political purposes.

When the country interest is at stake, either for questions of development, internal or external stability, or political advantage, China may be willing to cooperate and to enter into agreements more likely and willingly than what it would otherwise do. This is very much the case within the Security Council, epitome of international politics. Pressure to conform in order to reach a certain objective is an essential part of it. Cooperation is an exercise of utility[29]. In dealing with international institutions both from the outside and within the inside, China's practice proves to be rather instrumental, benefiting from multilateral forums as vehicles or devices.

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25 See speech by Daniel Russel (9 July 2019) Multilateralism vs. Unilateralism, World Peace Forum. Asia Society, available at https://asiasociety.org/policy-institute/multilateralism-vs-unilateralism accessed on 12 January 2022.

26 See for instance AIIB, BRICS, Asia-Pacific Space Cooperation Organization (APSCO), Shanghai Cooperation Organisation (SCO), FOCAC, APT etc.

27 Feltman, J. (2020). China's expanding influence at the United Nations—and how the United States should react. The Brookings Institution, Sept. p. 1

28 See Wuthnow, J. (2010). China and the processes of cooperation in UN Security Council deliberations. Chinese Journal of International Politics, 3(1)

29 Ibid. pp. 65 – 66

As Daniel Russel[30] addressed in 2019 at the World Peace Forum, multilateral institutions are devices built around shared values[31]. The values and principles that China tries to advance, as those drawn from the above analysis, are not necessarily those shared by the international community.

The United Nations is considered the paramount expression of multilateralism. Multilateral in nature, the United Nations is the key forum for international relations to flourish, and the Charter is the ideal instrument through which they regulate.

China has steadfastly grown its support for the UN, and is among the largest contributors in terms of budget and peacekeeping operations. This makes China both committed in global peace and stability while politically influential.

The UN Charter makes for an ideal instrument at China's disposal. According to article 2 of the Charter, the UN is based on the principles of sovereign equality, non-interference and territorial integrity. Besides holding the powers of a permanent member of the Council, the Charter enables China to uphold its assertiveness in preserving state sovereignty. As China sees it, the framework of the UN Charter and the functions of the Council entail both multilateralism and the principle of equal sovereignty among states that mutually integrate. For China the role of the United Nations is paramount.

3.2. *Multilateral engagement and the ICC*

Despite China has engaged in multilateral institutions and influenced processes of global governance, it has shown little or almost no interest in extending its efforts and resources to those that do not bring direct benefit, or result in any form of win - win cooperation. China foreign policy is a mix of multilateral and unilateral approaches aimed at shared benefits.

This encapsulates the nature of China's stance in relation to the ICC. The Rome Statute is the outcome of a multilateral diplomatic process born out of a *process of mutual persuasion and adjustment of interests and policies which aim at combining non-identical actor preferences into a single joint decision.*[32] This implies that conflicting interests existed and

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30 US diplomat, former Assistant Secretary of State for East Asian and Pacific Affairs (2013–2017) and current Vice President for International Security and Diplomacy at the Asia Society Policy Institute (ASPI)

31 See speech by Daniel Russel (9 July 2019), *supra note 24.*

32 Cit. Rittberger, V. (1998) "International Conference Diplomacy: A Conspectus" in MA. Boisard & ENM. Chossudovsky, eds., Multilateral Diplomacy, The United Nations System at Geneva: A Wbrhng Guide,

had to be negotiated so to reach a compromise. Finding a compromise and reaching an agreement for the establishment of an international judicial body and the crimes upon which its jurisdiction is framed, embodies the interplay between law and politics. Political elements determinative of such interplay are in most cases the domestic interests of the country at stake. This creates a correlation to the priorities of the Chinese foreign policy.

As one of the interviewees contended, *the PRC is simply not interested in that kind of Court. China participated at the various forums to know what that was about, to understand its mechanisms and to see what share of benefits it could feature*[33]. China does not want an international court to have jurisdiction over those crimes nor wishes to waive part of its sovereignty for it and lose partial control over its internal affairs. Being present at the various stages of the establishment of the Court, China has cautiously understood what it entailed, and knew its risks and benefits. It was therefore able to decide where to stand, and prepared to align to its actions or respond to any interference.

To have a permanent international body that may override its domestic criminal jurisdiction is not what China seeks from a win-win diplomacy.

This is even more true in relation to the crime of aggression and the link it creates to the Security Council.

The idea that maintenance of peace and security internationally is essential to guarantee prosperity and stability nationally reflects also on China's approach to multilaterlism and international institutions.

The achievement of the Chinese growth, together with order and security needs a high degree of strategic cooperation and mutual benefit internationally. Multilateralism that respects the preservation of the sovereignty of a country would probably be the Chinese perfect deal and the direction towards which China is oriented.

China has demonstrated an instrumental approach towards multilateralism and multilateral institutions. It uses a selective multilateral approach to adjust to the international global order and preserve a status quo both at the domestic and international level. The achievement of a status quo relies on, and is conducive to, international peace and security.

2d rev. ed. (The Hague: Kluwer, 1998) as cited in Kirsch, P., & Oosterveld, V. (2000). Negotiating an Institution for the twenty-first century: multilateral diplomacy and the International Criminal Court. McGill LJ, 46, p. 17.

[33] Interviewee 1.

4. China *versus* the International Criminal Court?

China has steadily supported the advancement of international criminal justice. China was a proponent of the creation of a permanent international judicial body to prosecute grave crimes since the early idea and became a relevant figure throughout its phases. It proactively participated at the establishment of the permanent international criminal court, at the various stages of its development and the codification of the crimes therein.

China was involved in the creation and application of the various international criminal tribunals, and took active part in the works of the International Law Commission and the working groups it entailed. China voted in favour of the establishment of the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, the Special Tribunal for Lebanon, and for the establishment of the Residual Mechanism for International Criminal Tribunals.

At this point of the research, it seems correct to assume that China does not stand against the creation and the functioning of an international judicial body to prosecute international crimes, as such. Casting a negative vote in Rome, and the continuous reluctance to join the Court seems to be targeted at the ICC specifically. Today the ICC has been in operation for almost two decades and has 123 Member States. China is still a non-State Party to the ICC, together with Russia, the US, India, Israel, and many others.

The concerns that China have raised at the various forums allow to detect the elements that may lead China to oppose to an international judicial body in generalised terms. In line with some key features discussed in the first part of this chapter, these elements seem to include primarily state sovereignty, the role of the Council, the achievement of the maintenance of peace and security, the notion of universality and equality, western-biased order, the principle of legality, independence and impartiality, and the legitimacy of international criminal justice system. The court conduct in relation to these aspects jeopardises its legitimacy and the exercise of its mandate is therefore not in the Chinese interest.

These aspects will be analysed through three key forms of legitimacy: source-legitimacy, performance-legitimacy, and result-legitimacy. These three forms of legitimacy capture the main framework on which the existing literature on legitimacy in the fields of IR, international law and political sciences tend to revolve.

4.1. *Source-legitimacy: Sovereignty*

China has supported international criminal institutions and their application as far as they did not affect directly on the domestic system of the country. In Tokyo for instance, the institution was not incorporated in the domestic law of the country, it kept an international asset that did not encroach on domestic legal orders. Despite the change of government from the Republic of China to the People's Republic of China, this attitude seems to have remained the same.

Voices of concern to preserve national sovereignty from the exercise of the Court jurisdiction began with the works at the ILC and continued throughout all the drafting stages of the statute of the International Criminal Court. In voicing its concerns on sovereignty China made its point on the importance of state consent and on the complementary nature of the Court's jurisdiction. The Court should not hold the status of a supranational judicial body with superior authority but cooperate with states on an equal level.

The same position was reiterated in the years that followed before and during the Conference in Rome.

As sovereign and independent entities, states presume that consent to be bound is the necessary condition to justify the exercise of authority of an international institution. Such a presumption therefore implies that without consent there would not be authority, but coercion and they may legitimately choose not to obey to coercion. Grossman et al (2018) define this justification as *legal legitimacy*[34] This also means that if a court acts *ultra vires,* going beyond the agreed and consented *bounds,* it would directly loose the due legal authority.[35]

State consent towards Security Council-authorised ICTs gains a different value. In the case of the *ad hoc* criminal tribunals (ICTY and ICTR), China objected to the idea of granting international tribunals primary jurisdiction over domestic ones because in breach of the principle of sovereignty. However, it did not block any of the two SC resolutions and in fact it consented to the first one. UNSC-authorised tribunals are legitimate by the binding nature

[34] Cohen, H. G., Grossman, N., Follesdal, A., & Ulfstein, G. (Eds.). (2018). Legitimacy and International Courts. Cambridge University Press. p. 5

[35] Ibid. p. 5

of the UN Charter vis-à-vis member states.[36] Therefore the ICTY and ICTR derive their legitimacy from the Council powers under Chapter VII to prosecute international crimes. On the other hand, the ICC operates upon the Rome Statute which is a multilateral treaty and presupposes that state parties consent to it. China sees the Court automatic jurisdiction as granting the Court the capacity to interfere on internal affairs of domestic jurisdictions and to target nationals of states who have not consented to its exercise of jurisdiction in relation to each specific case as a strong breach to the principles of sovereignty. In cases of SC referrals the situation becomes comparable to that of the *ad hoc* tribunals rooted in Ch VII of the Charter, and instituted for that specific situation.

4.2. *Performance-legitimacy: the principle of legality, independence and impartiality,*

Following the establishment of the Court in 1998, China started to rise its concerns also in terms of Court's performance. It was reluctant to the idea of waiving part of the country sovereignty for an institution that cannot guarantee the respect of the principle of legality, impartiality and independence. This created the basis upon which further reasons to claim its unwillingness to join the Court were built.

For the Court to be perceived as legitimate, its performance should conform to the principles on which it is built. When they are not met, expectations to see the principle of legality and justice fall short.[37]

Main issues of concern for China were the Court's jurisdiction that could be triggered without state consent (see for instance article 12(3) of the ICCSt), the abuse of prosecutorial powers[38] and the risk of politically biased decisions.

The rejection to investigate into the situation in Afghanistan and the series of the Security Council resolutions that requested the ICC not to investigate peacekeepers on the abuses in

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[36] Hayashi, N., & Bailliet, C. M. (Eds.). (2017). The Legitimacy of International Criminal Tribunals (Vol. 2). Cambridge University Press. p. 86

[37] See for instance *Ibid.*

[38] 王光亚谈 "国际刑事法院规约"[Wang Guangya talks about the Statute of the International Criminal Court] (29 July 1998), Legal Daily. Available at https://www.legal-tools.org/doc/bb0b03/pdf accessed on 16 November 2021.

Afghanistan[39] (see Ch. 3) confirmed China's fear that the Court could execute its mandate in an impartial manner. This proves to a degree the incoherence of the Chinese attitude, that seeks for impartiality but also subordination to a political body. However, in advocating for impartiality, China seems not to believe that the court could prove a consistent record of legitimate administration of international criminal justice as its mandate entails.

Impartial application of ICL seemed also to have been part of its history when China was involved. Looking back at the proceedings in Tokyo, as well as the subsequent domestic war crimes prosecutions (1956) the Chinese government approach was often politicised and impartial. In Tokyo for instance, Judge Mei was very concerned with the approach of his government and the judicial outcome that would derive from it. The new institution had to convey to the rest of the world the legitimacy of prosecuting perpetrators as important instrument to eradicate atrocities and victimhood of invading powers[40].

4.2.1. Universality and equality

Very much linked to the above analysis that endorses a cultural relativism in the understanding of the concept of justice, the Chinese rationale would seem to suggest that China holds some bitterness towards the Court application of the principle of universality and equality.

An international court that claims to be based on universal principles and holds the authority to apply a degree of universal jurisdiction should in fact respect all the values that each culture of the international community comprises and recognise them as true.

The ICC performance and jurisdiction presupposes already a different understanding of the justice value from that of the PRC. And despite China has taken part in the creation of the Court, the final outcome is eventually not what China wishes to be part of. To join the ICC would imply that China has to consent to be bound by the rules of an international body that does not take into consideration the country culture and that therefore in its performance cannot guarantee equal treatment *a priori.* China may likely see this as another imposition of non-Asian values conveyed as universal but which in fact reflect western standards. An international body that has the authority to out-step the consent of the state, and encroach in

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39 Security Council Resolution 1487 (2003) 4772nd meeting, S/RES/1487(2003), Security Council Resolution 1422 (2002), 4572nd meeting, S/RES/1422(2002).

40 For other examples both on the ROC and PRC trials please see Chapter 3 Part 2 of this work.

the domestic dimension of a country, should provide equal opportunities to the parties involved to abide by its rule in respect of each party interest. Otherwise, the exercise of its authority as universal body would be unfounded.

Retribution that aims primarily at the pursuit of justice and the upholding of the rule of law may mirror a western understanding of justice which is not in line with other culture's understanding, and which should not be the nature of a universal body. Despite western legal tradition has wield great influence on China, it does not mean that it is fully accepted and endorsed by China. China is wary of how universal core values are projected and to which degree they could reflect a different form of western hegemony. The heritage of the historical invasion of western powers against China plays a key role in the way China sees and decides to accept western values. The PRC seems to be susceptible to any form of prejudice and discrimination *built on socio-political differences*. An article of the Chinese journal *People's Daily* confirmed this: *prejudice resulting from differences between political systems has become deeply rooted in interpretations of China's human rights situation* (…) *the attitudes held by Western countries concerning China's human rights conditions are the result of different political and ideological systems and are a legacy of a "Cold War mindset"*[41] This article published in 2012, shows also the strong perception on the side of the Chinese of western values instrumentalised by western powers to interfere in the internal affairs of the country. They function as means to attack China on the way those values are administered according to the western understanding of it regardless of whether China as decided to be bound or not by them.[42]

This biased application of universal values, or universalised application of biased values, inhibits even more China from being interested to consent to the authority of the Court.

Waiving part of a culture and tradition to contribute to a system that considers only certain values as legitimate ones, and that therefore does not respect the diversity of the realities it should apply to, is not what China agrees to compromise to. This would delegitimise Asian values as of inferior status, not enough important to be included as part of the supranational body. It creates a form of hierarchy.

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41 Cit. Political bias concerning China human rights "deeply rooted": People's Daily, 29 January 2021, Xinhua, People's Daily Online, english.people.cn. Available at http://en.people.cn/90780/7713987.html accessed on 19 January 2022.

42 On this, see also Xiao, J. and and Zhang, X. (2013), *supra note 14,* p. 2

Following this rationale and the discussion on multilateralism that unfolded earlier in this chapter, the changes that China seems to be willing to bring in the functioning of institutional multilateralism, and world order more broadly, would see the establishment of an international judicial body as one that takes into account also Asian features, if it has to be acknowledged as universal and of equal application.

Equality, including also universal equal application, is part of the Five Principles of Peaceful Coexistence; it is the third pillar of the Bandung declaration and is a constitutive element of the Chinese word for *peace* (和平 *heping,* where *ping* 平 that stands for *even, equal, pair, quiet*); it is written in the PRC founding proclamation and in the Preamble of the Chinese constitution, and it is part of the core socialist values.

4.3. *Result-legitimacy: justice v. maintenance of peace and security*

The relationship between justice and maintenance of peace and security shapes the legitimacy discourse in relation to the Court when it comes to result-legitimacy. Result-legitimacy in this analysis looks at the outcome of the ICC performance of its functions, and the degree to which it contributes to the maintenance of peace and security.

To address this question, the ICC as an international judicial body is to be understood as the authority that has to be legitimised. The effectiveness to accomplish its mandate and therefore the successes or failures of the institution would legitimise or delegitimise its institutional authority. This rationale implies that despite the institutional mandate is built on legitimate values, the Court does not seem to endorse them losing its outcome-legitimacy.[43]

As seen earlier, China sees justice as an apparatus that permeates the whole legal system as a means for the authority to achieve its aims. The system is not governed by the rule of law, but as assumed, by the rule by law. China has lamented in various moments of its engagement with the ICC-related works, that the Court's performance often prioritises the upholding of the rule of law and the pursuit of justice at the expenses of peace. China has recognised these situations as Court's failure in living up to its mandate.

[43] Cit.Hayashi, N., & Bailliet, C. M. (Eds.). (2017), *supra note 35,* p. 87

Justice, as for the Chinese understanding, becomes a performative value. It is not the outcome value that legitimises the authority of an institution mandated to maintain peace. This seems to be a possible assumption of how China understands the justice-peace relationship within the ICC, and it fits the leadership priorities.

Let's take again as reference the Darfur situation that, as a red thread, helps to connect the various analysis so far undertaken within the lenses of the dichotomy justice and maintenance of peace and security. China did not agree with SC Resolution 1593 that referred the situation in Darfur because it believed that there were more effective approaches to address it. China saw it as an unnecessary approach to the situation that would have resulted in negatively impacting on the politics of the country resulting anyway into suffering and injustice. Processes of national reconciliation can be structural in post-conflict and reconstruction societies and may result into a more rapid settlement of disputes than what retributive justice could bring. The decision of the Court not to get involved would have served more its mandate when specific contexts require and would have more likely favoured the maintenance of peace and security. With this, China seeks to express the importance that judicial bodies respect the legal tradition of the concerned country when internal and international peace and stability are at stake[44]. Failing to do this, would imply the failure of the institution to live up to its mandate, and the loss of its legitimacy.

4.4. *Conclusive observations*

A legitimate Court has the justifiable right to issue judgments, decisions or opinions.

The ICC has failed to understand and respond to the legitimacy concerns that China raised in relation to the law it applies, the role of the Council and the core interests of the country. There is too much at stake. China does not see the ICC holding the legitimate right to investigate and issue judgements that could impact on China's core values and foreign policy. Or at least not enough for China to waive part of its sovereignty. As one of the interviewees said, *China is not interested in that kind of Court*[45]. To be a member of the ICC would entail certain risks that China is not willing to take. The PRC priority is to keep driving a whole country towards collective stability and prosperity, and it is doing it while keeping it unified

[44] *Ibid.*
[45] Interviewee 2.

and at an unparalleled pace. It does not see why an institution should be legitimate to hamper such an enterprise.

5. China *versus* the Crime of Aggression

Traditional Chinese culture never truly supported or glorified war, and Chinese philosophies such as Mohism or Confucianism found it almost unacceptable. Yet, the reality had been different. Despite the tribute system was built on the idea of peaceful relations of dominance-subordination with neighbouring countries governed with harmony and peace under the unified empire, war and aggression were often the best-known means to maintain power and re-establish order and security. Following the century of humiliation that culminated with the WWII Japanese aggression China engaged with the international community in reaction to the atrocities suffered and, in an attempt to contribute to the outlawry of war.

War means instability: socially, politically and financially. The absence of war is one of the elements upon which the assumption that only when peace and security are reached globally China can flourish as a nation. Vice-versa, internal prosperity also means a powerful nation to the international community.

Aggression is *the use of force by one state against the sovereignty, territorial integrity and political independence of another state*[46]. Connecting the dots, namely protection of internal affairs from external interference, and the culture predisposition for harmony, order and stability, makes China by nature against aggression. China has indeed proactively participated at the various stages of the development of the crime since its origins and has greatly contributed to its codification advancing its point of view and concerns that no doubt had an influence in the final outcome of the crime.

It thus seems a far-fetched presumption to contend that China is against the idea of criminalizing aggression. Culturally and politically, China has to the contrary proved to disagree with the use of force as tool to solve controversies.

It cannot be denied that the crime of aggression is an exceptional crime by its nature. It embodies maintenance of peace and security, the protection of state interests – sovereignty, territorial integrity, non-interference -, and grants the Council a fundamental role that

[46] Definition of Aggression (1974) United Nations General Assembly Resolution 3314 (XXIX)

encroaches on the operations of the ICC. Three key aspects that loudly echo Chinese core interests. On the other hand, such exceptionalism derives also from the controversies that it rises and that impact on the country disposition.

The stance that China has taken in opposing to it as a crime under the ICC jurisdiction, despite the compromises reached in Kampala, seems to set the point of contention on the way the crime is to be applied, the body through which it is to be applied, the outcome its application conveys and to which degree China is affected by it.

These critical aspects, characteristics of the state behaviour before the crime of aggression, are the final results of a combination of the various elements analysed so far.

This section will take under consideration three major aspects that encapsulate the above-mentioned critical aspects and the relevant conditions inherent to the Chinese legal and political attitude. The following analysis will delve into these three elements taking into account the historical, cultural, legal and political nature of the country so to explain the rationale behind the Chinese behaviour in relation to the crime of aggression under one single umbrella, the protection of states interests.

5.1. *Between protection and frustration of state interests*

The crime of aggression can be seen as playing a specular effect in relation to sovereignty, territorial integrity, and non-interference of states. It may protect them, but also frustrate them. Converting some of the elements that were seen as affecting the institutional legitimacy of the Court into this discourse, it may be possible to tell how the crime expresses such a duality and how this affects China's behaviour.

5.1.1. Complementarity and state consent

Complementarity and state consent are the bridge through which state sovereignty and the legitimacy of Court encroach.

Already element of concern and of heated discussions, the principle of complementary is further challenged when it comes to the Court's exercise of jurisdiction over the crime of aggression. One of the distinctive traits of this crimes is the prior determination that the state

of the individual allegedly responsible has committed an act of aggression, in order for the Court jurisdiction to be triggered.

This means that to comply with the principle of complementarity, domestic courts' jurisdiction over the crime becomes difficult to implement. Besides the fact that it seems unlikely that the domestic courts of a state would prosecute their state leaders, the inclusion of a provision to prosecute the crime of aggression in the domestic legal order of a country, would mean that either the ICC or the SC has to have already determined the existence of the crime before national courts may proceed with the prosecution of the crime. The matter is controversial.

Complementarity does not seem to apply to the crime of aggression as it does in relation to other crimes. According to the principle of complementarity, the ICC should be considered as Court of last resort. In the case of the crime of aggression, the ICC become the only viable procedure for the crime to be prosecuted. State consent as building on the Court's source-legitimacy becomes an issue at stake.

The amendments adopted in Kampala, provides for three procedures that can trigger the Court jurisdiction over the crime. Under article 15bis of the Rome Statute, if the Prosecutor believes that there is reasonable ground to proceed with an investigation into a situation or, following the referral of a state, the Security Council has to determine that an act of aggression has occurred in order to allow the prosecutor to proceed with the investigation[47]. If the Council determines the existence of an act of aggression and refers[48] it to the Court there is no need of consent by the relevant state whether it has or not ratified the Kampala amendments. However, the Council's power is not made exclusive, as China wished. If the Security Council does not make any determination, the Prosecutor may nevertheless proceed upon authorization of the pre-trial chamber. In this case however, the Council may decide to suspend the proceedings as for Article 16 of the Statute[49]. Such result was the compromise between the preservation of the Court independence and the role of the Council under the UN Charter. China disagrees with this final outcome.

China never compromised its position and believed that to trigger individual criminal liability the state has to commit an act of aggression and it is the competence of the Security Council to determine that acts of aggression occurred. Otherwise, individual responsibility

47 See Article 15bis, Rome Statute.
48 See Article 15ter, Rome Statute
49 Article 16, Rome Statute

cannot be ascertained, or it would run counter the provisions of the Charter[50]. China would likely believe that the Council's referral to a situation without the need of state consent is legitimate because the Council is living up to its role in line with the provisions of the Charter. Conversely, it would see the prosecutor's power to proceed with the investigation as not in conformity with the UN Charter. As for the other permanent members, China believes that the final result of the amendments in relation to the triggering of the Court jurisdiction disregards the provisions of the Charter of the United Nations. China sees the Charter as empowering the Council with primary capacity and control over the maintenance of peace and security, and with the exclusive power to establish that aggression occurred. China sees this as bypassing entirely its veto power. To see the functions of the Council including the privileges of its members somehow bypassed is seen as a potential future crisis of the system of collective security. Interference by an external judicial body may undermine it. To put the Security Council and the ICC facing the risk of an institutional rivalry, may polarize the international society over certain situation bringing instability to the international order.

China sees the Security Council as only subject to be involved and able to avoid such a disastrous outcome. Even the GA and the ICJ would be seen as not entitled to those responsibilities. China showed reluctance to proposals to include them in the judicial procedure over aggression, at the working groups and negotiations after Rome.

To be a non-state party to the Court seems to be the only guarantee that China can seize in order to preserve its internal affairs from external scrutiny. The *opt-in* system that allow states not having ratified the amendments to be exempted from the Court's jurisdiction over this crime, may discourage even more China in accepting the Court's jurisdiction over the crime. The Court focus will be directed only at states parties that have ratified the amendments. State parties become therefore the point of convergence of a restricted focus for judicial scrutiny and impartial application of its in principle universal nature.

5.1.2. Maintenance of peace and security v. internal stability: a juxtaposition

[50] See for instance China and the International Criminal Court (19 April 2004), in China's Work in the Legal Field of the United Nations, section VI available at https://www.mfa.gov.cn/ce/cegv//eng/gjhyfy/hflygz/t85684.htm accessed on 16 November 2021.

The crime of aggression, by its very nature, is aimed primarily at the maintenance of international peace and security. This is pretty much the same as for the other crimes. The Rome Statute recognizes that *such grave crimes threaten the peace, security and well-being of the world.*[51] The previous determination that an act of aggression has occurred for jurisdiction over the crime of aggression to be triggered implies that sovereignty, territorial integrity or political independence of states is also protected. Article 8*bis* (2) of the ICCSt clarifies that an '*"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'*[52]. The link to the UN Charter and the Security Council that this crime incorporates reinforces the multifaceted interplay of these two features within the crime, pillars upon which international law and international relations are built. Such a dualism, however, may collide considering that each and every state has as ultimate interest the protection of its own domestic sphere. It is a contradiction in terms. The exercise of jurisdiction over the crime of aggression by an international judicial body without state consent may hinder the preservation of state sovereignty. Peace and security and preservation of sovereignty are not only international pillars, but also core internal values and as already seen, this is very much the case for China. This duality becomes even more sensitive considering the focus the crime of aggression has on the leadership class by reason of the nexus the state act has to the leadership requirement.

5.1.3. A leadership crime

The leadership nature of the crime is a feature that was clear already in Nuremberg and Tokyo. In the Rome Statute this constitutive element of the crime is articulated more in detail in article 8bis (1) and in article 25(3bis). Perpetrators have to be in a position to exercise effective control over the act of the state.[53]

In China the political leadership is, and is considered to be, the main architect of the unprecedented transformation that the country has undergone in the past fifty years.

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51 Preamble, Rome Statute of the International Criminal Court. (2011)
52 Article 8bis(2), Rome Statute of the ICC.
53 See Article 8bis, 25(3bis), and the Elements of Crimes Article 8*bis.*

In the first part of this chapter, it has been discussed how the leadership in China is the authority that justice serves to build people's trust for the government agenda. It is the authority that has to be legitimized so to be justified in the exercise of its powers and obeyed in pursuit of its final purpose. It is the entity behind the image that Chinese judicial institutions construct in support of the legal-political agenda of the party-state. The Chinese leadership is the entity that can give the Chinese people what they are due, and is therefore who gives them justice, as for the Chinese understanding of it. It functions as the linchpin in the harmonized interplay between the international community and the growing prosperity and well-being of the country domestic sphere, the one that connects the national dimension to the international one. It is the vehicle through which international cooperation and reciprocity is endorsed to achieve the Chinese internal *order and stability.* It is the political space that justice has to keep free from interference.

The return of the Confucian dictates in contemporary China also serves these purposes. As briefly outlined in the third chapter, Confucian virtues are built on benevolence (仁 *ren)*, righteousness (义 *yi)*, proper behaviour (禮/礼*li)* and filial piety (孝 *xiao*). These four elements incorporate a normative power that form a share of the Chinese notion of justice. They serve the government to shape and transform the behaviour of the collectivity and to frame the hierarchical relationship between the leadership and the people legitimised under the authority of the *Confucian ruler.* It is part of an authoritarian mechanisms to build respect to one's ruler and its agenda.

Another relevant aspect concerning the *sanctity* of the leadership class is the value the Chinese culture gives to the idea of pride and shame, honour and humiliation. These concepts are all part of the meaning of the word *face (mian* 面), of key relevance in the Chinese culture. The Chinese *face* is a value that can be either gained, granted or taken away and has to be fought to be preserved. It lies at the basis of Chinese social rules. The Chinese leadership would lose its face if it fails to exercise its authority in a legitimate way. Not to mention the idea that a Chinese leader could be prosecuted for a crime that was created also by means of the Chinese willingness and efforts to first prosecute the Japanese leadership, including the emperor who was eventually exempted from prosecution. It would be very hard to accept for China. It would mean to lose its *face* with fear of falling again into a century of humiliation.

The Chinese political leadership is the fulcrum through which all the dimensions involved in the wider project to achieve national order and security within a harmonious peaceful global order convey and generate. Its legitimacy cannot be threatened nor the leadership itself. The *Mandate of Heaven* cannot be dismantled.

The role that the Chinese political leadership is playing in international relations, together with the role that China plays as global economic power is fundamental in international cooperation and global governance. If threatened, it could jeopardise international stability.

6. **Where does the Security Council stand?**

Among the key priorities that China has always defended remains the role and functions of the Security Council. The Council is an integral part of the functioning of the ICC, and the Chinese position as permanent member of the Council binds China to continuous engagement with the Court. China believes in the legitimacy of the United Nations and of the Council, paramount expression of multilateralism that preserves the notion of sovereignty and state independence as foundational elements rooted on the Charter. Any risk to the legitimacy of the Council may be seen as a risk to its responsibility in maintaining global peace and security and to China's position in international power-politics. If multilateral institutions are devices used to project the image of the state to the international community and to vehicle the relationship among international legal personalities, they also have to be considered legitimate bodies on which the state can rely for the projected image to reach its public as wished.

As already discussed, China's foreign policy has to safeguard the country interests in terms of sovereignty, development and security. These interests need the preservation of a domestic political stability, territorial integrity and prosperity. To reach this status quo the country needs to reflect its priorities and policy also onto the external world, multipolar in nature. The country development internationally together with global peace and stability have direct impact on the country internal purposes. Under these conditions, the management of international power relations become fundamental, and the Security Council is for China the fulcrum around which this gravitates. The Council would give China powerful multilateral tools to safeguard its national interests, to engage with major world powers and to address

threats to international order and stability and promote the maintenance of peace and security.

As well, being the Security Council a political body, China may see it as closer to its approach to peace and justice, and the application of its mandate to better align with its approach in relation to the maintenance of peace and security. To be part of the Council and to have the Council being part of the functioning of the Court would allow China to preserve a degree of control over the international judicial body that China sees as not meeting any legitimacy standard.

Source-legitimacy and performance-legitimacy seem to be fulfilled and being China active power within it has the capacity to have a degree of impact on result-legitimacy.

These are in brief the reasons behind the importance that China, as well as the other permanent members, grant to the Council and the preservation of its role and functions. They come in support and protection to the powers China enjoys as permanent member and as axle around which the international system of collective security is built and is to be preserved.

The compromise reached in Kampala brings on the scene a dualism between the Security Council and the ICC that China, as well as the other permanent members, are not thrilled to see. Such a dualism entails a new framework of checks and balances that may weight on the Council performance. The effects that this dualism may produce go beyond the prosecution of the crime of aggression in itself. This dualism, and the judicial *interference* onto the functions of the Council may transform the dynamics upon which the system of collective security is built and the approaches it entails.

As Carsten Stahn puts it, *prior determination by the Security Council as a prerequisite to the exercise of jurisdiction would have strangled the ICC's jurisdiction at birth*[54]. There is not a proper filter to the prosecutor's possibility to begin with an investigation. The only limit to it, is not to be a state party to the Rome Statute or not having accepted the Kampala amendments over the crime of aggression.

[54] Stahn, C. (2010). The 'End', the 'Beginning of the End'or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'. Leiden Journal of International Law, 23(4), 875-882. p. 877

7. CONCLUSION

This final chapter was thought as a space where the arguments explored throughout the research converge and channel into the formulation of the responses to the second research aim.

To briefly trace back the main elements of the research findings to the first aim, China has consistently engaged in the various stages of the creation of the first permanent international criminal court as much as in the lengthy and convoluted processes that brought to the codification of, and final compromise over, the crime of aggression.

The crime of aggression is a crime committed by a leader or a policy-maker exercising effective control in the planning, preparation, initiation or execution of an act of aggression carried out by a State manifestly in contravention to the Charter of the United Nations. The uniqueness of the crime of aggression is mostly linked to its double nature: it is a crime under the jurisdiction of the ICC, yet it requires the existence of acts of aggression by States, which prevention is one of the primary purposes of the United Nations. Such a duality gives rise to two types of criminal liability, namely individual responsibility for the planning, preparation, initiation or execution of an act of aggression and state responsibility for the commission of acts of aggression. This also implies that the two institutional designs born out of the WWII, one being the Security Council - quintessential international political body - and the other a permanent international criminal court - international judicial body - eventually encroach.

These features make the crime the cradle of the dichotomy law and politics, justice and maintenance of peace and security.

The controversies that the multifaceted character of the crime have generated since the post-war IMTs have shaped and affected all the endeavours and the institutions it involved. Furthermore, the geopolitical context in which the crime and the Court developed also affected the codification and negotiation processes. This resulted in more than twenty years of negotiations for the adoption of a definition of aggression in 1974 by the General Assembly that was not far from the one Justice Jackson gave in Nuremberg. As well, the outcome of the decades of efforts by the International Law Commission did not distance either from the 1974 General Assembly Definition, nor it solved its shortcomings. The discussion at the various forums and their results were always a *quasi*-repetition of previous

debates. A definition of aggression was not found until very recent times, thanks to a series of efforts that concluded in 2010 with the adoption of the amendments in Kampala.

For the first time, both individual and state conduct for the crime of aggression were defined and adopted in a legally binding document. The bodies involved in the whole process were both political and judicial and embraced the dichotomy through the interplay between aggression *qua* exceptionally serious breach of international obligations for which states may be held responsible, and aggression *qua* international crime that triggers individual criminal responsibility. The compromise reached by consensus in Kampala was an important achievement of the international community. Yet, the acts listed in paragraph 2 of article 8*bis* are the same of article 3 of the definition of aggression annexed to resolution 3314 (1974). Eventually, the definition given by the different relevant institutions, either judicial or political, are linked to the Security Council.

China played a relevant role in the achievement of the final compromise over the crime, both on a passive role, as one of the major victims of aggression during World War II, and on an active role in the codification processes.

Despite on a different foot, both Chinese governments, namely the Republic of China and the People's Republic of China, have demonstrated to have embraced the international criminal justice experience in a comprehensive manner.

In nearly one century of efforts, China has proved a consistent participation and support to the development of international criminal law and to the establishment of a permanent international criminal court. As well, it showed commitment for the codification of the crimes therein, and persistency in the lengthy evolution of the crime of aggression. However, the Chinese government has also revealed a high degree of incoherence over certain matters that seemed to reflect the state's foreign policy preferences.

Dominant traits of the Chinese behaviour are the stress that China put on states' consent to trigger the jurisdiction of the Court, on the Court's independence and impartiality despite subordination to, or at least coordination with, the authority of the Security Council, and the application of the Court's jurisdiction over the crime of aggression primarily in relation to the principle of complementary, the preservation of state sovereignty, the exclusive role of the Council in the determination of acts of aggression, individual criminal liability against high officials, and the powers of the prosecutor to bypass the functions of the Council. In other words, major point of contention lied on the way the crime is to be applied, the body

through which it is to be applied, the outcome its application may convey and to which degree China is affected by it.

These features are all part of a sole broader concern, the preservation of state interests. The protection of state interests is the core priority of the Chinese government. The PRC understands the preservation of sovereignty, security, and development under a legitimate leadership as only guaranty to the government priorities. Peace, order and stability have always been part of the Chinese identity and have become the exact means to that aim. On these premises, the behaviour that China has held throughout the evolution of the Court and the development of the crime of aggression does not hide a predisposition of the state to prioritize the restoration and maintenance of peace and security. Emphasis on peace and stability were a persistent part of the Chinese narrative to the international community both as a nation and as a permanent member of the Security Council. Being peace, order, and stability essential to the protection of state interests, China's rationale for peace and security with a rather narrow notion of peace does not come as a surprise. Such a restricted notion seems to include order, stability, cooperation, and mutual benefit, and seems to leave out those elements that are normally part of the notion of peace as for the current architecture of global governance. This does not mean that China does not believe in justice, but that it understands and expresses it differently. Justice seems to assume, as for this work understanding, a performative and accessorial value. China's rationale for peace and security does not actually leave out the justice element but grants it a different value. Justice is used as an apparatus that permeates the whole legal system to allow the authority to achieve its aims. It is expressed to convey order and to shape social attitudes, so that people can accept the leadership agenda as legitimate. Justice has to be consistent with the priorities of the state: economic growth, development goals and internal stability. It is not a moral concept and does not function upon it. Justice is indeed also what the nation, as a collectivity and therefore also as individuals, deserves. The delivery of financial and social stability to the population to guarantee wealth and security for all convert the leadership into a justice provider and makes its authority legitimate.

China tends to apply a degree of systematic instrumentalization of values that may serve the purposes of the Chinese leadership.

The peaceful rhetoric is useful to China's foreign relation. China's new diplomacy that increasingly converged on preserving sovereignty, development and international stability

can be understood as motivated by the need to ensure internal stability. This is complementary to safeguard the legitimacy of the authorities while projecting to the world the image of a peaceful country and responsible power. The more powerful and the more legitimate it becomes, the more influence and control it can exercise to internal stability and party-state legitimacy.

China attitude before the ICC and the crime of aggression responds by extension to the multi-layered apparatus designed to ultimately protect national interests.

The crime of aggression can be seen as playing a specular effect in relation to sovereignty, territorial integrity, and non-interference of states. It may protect them, but also frustrate them. The bonding tie it creates between state responsibility and the individual criminal responsibility attributed to the individual acting in official capacity within the policy of the state and the leadership class creates too many elements that infringe upon the idea of preserving sovereignty. On the other hand, an international judicial body such as the ICC may translate into a source of scrutiny threatening the internal dynamics of the country. State consent and the principle of complementary become therefore two mechanisms that have been created to address this issue and avoid any risk of infringement upon the country sovereignty. However, the way the Court seems to implement them and the degree of politics that are normally part of international relations may impact on their effective functioning and to engage with the Court may become risky. Furthermore, the inconsistency in the functions of the court, the loopholes that the final compromise created also considering the impact that opt-out, opt-in mechanisms and automatic jurisdiction within the same system may bring, does not seem to have brought China closer to its acceptance. The ICC has failed to understand and respond to the legitimacy concerns that China raised in relation to the law it applies, the role of the Council and the core interests of the country. China does not see the ICC holding the legitimate right to investigate and issue judgements that could impact on China's core values and foreign policy. Or at least not enough for China to waive part of its sovereignty. As one of the interviewees said, *China is not interested in that kind of Court*[55]. To have a permanent international body that may override its domestic criminal jurisdiction is not what China seeks from a win-win diplomacy.

Similar argument exists in relation to aggression. China has proved to disagree with the use of force as tool to solve controversies and is not against the criminalization of aggression as

[55] Interviewee 2.

such. However, the crime of aggression exercised by an international court which jurisdiction might be triggered without state consent may also impact on the preservation of state sovereignty.

Concerns in relation to the crime of aggression become even more tangible considering the weight the crime of aggression has on the leadership class. The Chinese leadership is considered the entity that can give the Chinese people what they are due, and is therefore who gives them justice, as for the Chinese understanding of it. It functions as the linchpin in the harmonized interplay between the international community and the growing prosperity and well-being of the country domestic sphere. The Chinese political leadership is the fulcrum through which all the dimensions involved to achieve a harmonious peaceful global order convey and generate. Its legitimacy cannot be threatened nor the leadership itself.

To prosecute the crime of aggression without state consent may result in either the failure to restore and maintain peace and security or in jeopardising state sovereignty and the legitimacy of the leadership.

The attention that China has given to the Security Council supports the whole narrative. The country development internationally together with global peace and stability have direct impact on the country internal purposes. Under these conditions, the management of international power relations become fundamental, and the Security Council is for China the fulcrum around which this gravitates. China sees the Council as legitimate body that may serve its ultimate interests.

China is not ready to lose that degree of control over its domestic affairs.

The idea that maintenance of peace and security internationally is essential to guarantee prosperity and stability reflects on China's approach to multilateralism and international institutions. The achievement of the Chinese growth, together with order and security needs a high degree of strategic cooperation and mutual benefit internationally. China searches a multilateralism that respects the preservation of the sovereignty of a country, and it is the direction towards which China is oriented.

China predisposition towards peace is not only linked to matters of foreign policy, stability, and legitimacy, it is as well part of the inherent cultural philosophical tradition, *per se* utilitarian.

To conclude, the compromise reached in Kampala brings on the scene a dualism between the Security Council and the ICC that China, as well as the other permanent members, are not thrilled to see.

The Chinese presence and efforts throughout the development of the crime can be translated into state practice and *opinio juris.* Besides, the stances that China has taken in the century-long endeavours have undoubtedly influenced to a degree the outcome in Kampala.

China's position is strongly linked to the government project to achieve a harmonious and peaceful global order. The fact that the idea that a *Super-China* can be built and preserved only with a world at peace is paramount to understand the country attitude in international fora. China sees the emergence of any potential conflict that can bring socio-economic instability as detrimental to the achievement of the Chinese priorities, and to the maintenance and consolidation of its status as great power. The instrumental need for peace and harmony drives the PRC leadership towards *ad hoc* foreign and domestic policies. Peace has become deep-seated in the Chinese policy-thinking.

The sentence written by Xue Yuan encapsulate the whole discourse: *"the construction of an ontological status of moral superiority ... is consistent with the perceived historical experiences of "Confucian Peace" as opposed to hundred years of national humiliation and turbulence inflicted by the West".*[56]

[56] Yuan, X (2020). *supra note 9,* p. 32

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