

IV. INTERNATIONAL CRIMINAL LAW AND WAR

THE CRIME OF AGGRESSION BETWEEN INTERNATIONAL AND DOMESTIC CRIMINAL LAW

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I. THE CRIME OF AGGRESSION IN INTERNATIONAL LAW

A. The Prohibition of War

In the 19th and early 20th century, war was considered a legitimate political tool. The law of Geneva and the law of The Hague were established as *jus in bello*. The *jus ad bellum*, however, was still seen as a sovereign decision of the states, as Prussian general *Carl von Clausewitz* put it in his famous quote: «War is merely a continuation of politics by other means.» The decision on war and peace was not accessible to legal, let alone judicial control. What today is often called the «supreme offense» against international law was not even considered unlawful just 100 years ago.

The unlimited right of states to wage war was first cautiously called into question in the course of the Hague Peace Conferences of 1899 and 1907, where the parties agreed to settle conflicts peacefully as far as possible. After World War I, the international community attempted more seriously to ban war as an instrument of politics. The preamble to the *Covenant of the League of Nations* of 28 June 1919¹ emphasized the duty of the state parties «not to resort to war,» in order to ensure international peace and security. In Article 10 of the Covenant, the parties agreed to respect «the territorial integrity and existing political independence» of

1 Reprinted in Sir G. Butler, *A Handbook to the League of Nations* (1919), pp. 49 et seq.

states. In order to settle disputes that could lead to war, an arbitration system was introduced. The *Versailles Peace Treaty* of 28 June 1919² even went one step further. In its Article 227(1), it stated: «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.» However, this new and ambitious model of establishing individual criminal responsibility under international law was never implemented.

While the prohibition of war in the *Covenant of the League of Nations* of 28 June 1919 was incomplete, its deficiencies were to be corrected by the Geneva Protocol of 2 October 1924,³ which provided for a comprehensive ban on war. States that violated the provisions of the Protocol were denounced as aggressors (Article 10). But lacking a sufficient number of ratifications, the Geneva Protocol never entered into force. Instead, the system for prevention of war was expanded at a regional level. In the *Treaties of Locarno* of 16 October 1925,⁴ the states parties agreed to solve conflicts peacefully in their mutual relations. The use of force would only be permissible in exercise of the right of self-defense and as part of League of Nations sanctions.

The decisive step towards a comprehensive ban on war was taken with the *Kellogg-Briand Pact* of 27 August 1928.⁵ In the preamble of the pact, the states parties declared «that the time has come when a frank renunciation of war as an instrument of national policy should be made.» By 1939, 63 of 67 states in the world had ratified the *Kellogg-Briand Pact*, giving it near-universal applicability.⁶

2 11 *Martens Nouveau Recueil Général de Traités*, ser. 3 (1923), pp. 323 et seq.

3 *Protocol on the Pacific Settlement of International Disputes* of 2 October 1924, International Legislation II (1922-1924), pp. 1378 et seq.

4 The *Treaties of Locarno* of 16 October 1925, 54 *U.N.TS* (1949), p. 290, consist of a treaty signed by Germany, Belgium, France, Great Britain, and Italy, in which Germany, France, and Belgium agreed to mutually renounce war and to an obligatory arbitration process. This treaty was supplemented by arbitration accords between Germany and Belgium and Germany and France, and two arbitration treaties between Germany and Poland and Germany and Czechoslovakia. See B. Broms, 154 *Recueil des Cours* (1977), pp. 307 et seq.

5 *Treaty for the Renunciation of War as an Instrument of National Policy* of 27 August 1928. The treaty text can be found at <<http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>>. On the history of this treaty, see C.D. Wallace, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (1997), pp. 76 et seq.

6 Only four of the states in existence before World War II (Argentina, Bolivia, El Salvador, and Uruguay) were not parties to the *Kellogg-Briand Pact*, see I. Brownlie, *International Law and the Use of Force by States* (1963), p. 75, fn. 2. However, these states were bound by the *Saavedra Lamas Treaty* of 10 October 1933, 163 *LNTS*, p. 393, in a manner similar to the states parties to the *Kellogg-Briand Pact*, see H. Meyer-Lindenberg, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4 (2000), pp. 273 et seq.; A. Randelzhofer, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4 (2000), p. 1246 at p. 1248.

Although it could not prevent the outbreak of World War II, waged by aggressive regimes that deliberately ignored their obligations under international law, there is no doubt that by the end of the 1930s, international law's position toward war had changed dramatically.

The *Kellogg-Briand Pact* also had several weak points: in particular, like the *Covenant of the League of Nations*, the treaty based its prohibition of warfare on an overly narrow, formal concept of war. Further, the use of belligerent force remained permissible as part of collective measures by the League of Nations, since war was only renounced as a tool of national, not of international, policy. In addition, through declarations submitted when the treaty was signed, the parties made clear that the treaty did not limit their right to self-defense. As the *Kellogg-Briand Pact* itself contained no definition of lawful self-defense measures, this left open the danger of misuse of the right of self-defense. Nevertheless, the *Kellogg-Briand Pact* played an important role for the punishment of the war of aggression by the Nuremberg Tribunal.⁷

Following World War II, the prohibition of aggression was significantly expanded in the U.N. Charter. The U.N. Charter departed from the traditional concept of war, which had left room for abuse by states. In Article 2(4), 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 with the purposes of the United Nations.» Two exceptions to this prohibition are provided: the right to self-defense against an armed attack, which is regulated by Article 51 of the U.N. Charter; and military measures that are based on an authorization by the Security Council under Chapter VII of the U.N. Charter in the case of a threat to peace, breach of peace, or an act of aggression (Article 39). The term «aggression» in the sense of Article 39 U.N. Charter has been further explained in the annex to U.N. General Assembly Resolution 3314 (XXIX) of 14 December 1974 (the so-called U.N. Definition of Aggression).⁸

Article 1 of the U.N. Definition of Aggression defines an act of aggression as «the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state.» Article 3 lists examples of acts of aggression: invasion of another state or attack by armed forces, or occupation resulting from there (*lit. a*); bombardment or use of any weapons against the territory of another state (*lit. b*); blockade of ports or coasts (*lit. c*); attack on the land, sea or air forces, or

7 International Military Tribunal, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, p. 38

8 On the U.N. Definition of Aggression, see J. Stone, 71 *American Journal of International Law* (1977), pp. 224 et seq.

marine and air fleets of another state (*lit. d*); the presence of armed forces within the territory of another state without the agreement of that state (*lit. e*); allowing its own state territory to be used by another state for perpetrating an act of aggression against a third state (*lit. f*); sending of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of a comparable gravity as the other acts listed above (*lit. g*).

B. Criminality of Aggression under Customary International Law

Let me now turn to the question whether violations of the prohibition of aggression entail individual criminal responsibility under international law, and which violations this applies to. Here, we must clearly distinguish between illegality and criminality of an act of aggression. We will see that a zone of criminal responsibility does exist, but is plainly narrower than the scope of what is prohibited by international law. If we look at state practice and *opinio juris*, the finding is clear: Only aggressive war, as a particularly grave and obvious form of aggression, is criminalized under customary international law.

B.1. The Precedents of Nuremberg and Tokyo

So far, the only precedents for the punishment of acts of aggression in international context were set after World War II, in particular by the Nuremberg and Tokyo military tribunals. Under Article 6(a) of the Nuremberg Charter, a crime against peace is the «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.» This was the first time an international treaty established individual criminal liability under international law for waging a war of aggression.⁹ During the Nuremberg trial of the major war criminals, all 22 defendants were charged with crimes against peace, and twelve¹⁰ were convicted of this crime. The wording of Article 6(a) of the Nuremberg Charter was copied in Article 5(a) of the Tokyo Charter. At the Tokyo trial, 28 defendants were charged with crimes against peace and 25 were convicted.¹¹

9 On the development of the norm, see W.A. Schabas, in G. Politi and M. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004), p. 17 at pp. 22 et seq. See also C. Gray, 14 *European Journal of International Law* (2003), pp. 867 et seq.

10 Namely, Göring, Hess, von Ribbentrop, Keitel, Rosenberg, Frick, Funk, Dönitz, Raeder, Jodl, Seyss-Inquart and von Neurath.

11 See P. Osten, *Der Tokioter Kriegsverbrecherprozeß und die japanische Rechtswissenschaft* (2003), p. 30.

Article II(1)(a) of Control Council Law No. 10 also followed Article 6(a) of the Nuremberg Charter in regulating crimes against peace. At the Nuremberg follow-up trials, a number of additional indictments were brought on this basis, but only two other defendants were convicted.¹²

Punishment of those responsible on the Axis side for crimes against peace encountered considerable criticism. In particular, it was argued that crimes against peace were applied *ex post facto*, which violated the principle of legality. The critics are correct that waging war was not explicitly criminalized prior to the outbreak of World War II. As discussed above, war was widely proscribed, but no provision called for criminal prosecution of those responsible. The Nuremberg Tribunal justified the critical step from prohibiting aggressive war to criminalizing it with substantive arguments: given the grave consequences, waging an aggressive war was the most serious of all crimes. To enforce the prohibition of war, those responsible had to be punished. Crimes under international law, said the tribunal, were not committed by states themselves, but by people, who needed to be held accountable.¹³ The tribunal thus concluded, from the fact that waging an aggressive war deserved and needed punishment, that it was in fact criminal.

From today's perspective, however, it is widely accepted that the charters of the Nuremberg and Tokyo Tribunals, as well as their judgments, form the basis for the criminalization of aggressive war: In 1946, the international community unanimously affirmed the criminality of waging aggressive war (as punished in Nuremberg) in U.N. General Assembly Resolution 95 (I). Article 5(2), sentence 1, of the U.N. Definition of Aggression also stipulates that «a war of aggression is a crime against international peace.» The *Draft Codes of Crimes against the Peace and Security of Mankind*, prepared by the International Law Commission in 1954, 1991 and 1996, also contained the crime of aggression.¹⁴ Last, but not least, the crime has been included in the ICC Statute.

12 See U.S. Military Tribunal Nuremberg, judgment of 14 April 1949 (*von Weizsäcker et al.*, so-called Ministries Trial), in *Trials of War Criminals* XIV, pp. 308 et seq. Wilhelm Keppler and Hans Heinrich Lammers were convicted. The convictions of Ernst von Weizsäcker and Ernst Wörmann, who were also originally convicted of crimes against peace, were overturned on appeal. See generally PCNICC/2002/WGCA/L.1, paras. 209, 225.

13 International Military Tribunal, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, p. 447.

14 See 1991 Draft Code, Arts. 15 et seq., and 1996 Draft Code, Art. 16. The 1991 draft contains a far-reaching provision, essentially based on the U.N. Definition of Aggression of 1974, and thus follows on the 1954 draft, see J. Hogan-Doran and B.T. van Ginkel, 43 *Netherlands International Law Review* (1996), p. 321 at p. 335; Art. 16 of the 1996 Draft Code, in contrast, followed a more restrictive

The Nuremberg and Tokyo trials embody the state practice that is necessary for the creation of customary international law, confirmed by states' official statements, for example in connection with the Definition of Aggression. The fact that no other trials have occurred involving the waging of aggressive war does not contradict this, since the fact that criminal norms have been violated with impunity does not call their validity into question.¹⁵ Based on this evidence it can be assumed that a war of aggression is criminal under customary international law. The scope of the offense must be determined on the basis of the only precedents to date, the Nuremberg and Tokyo judgments. Other acts of aggression of lesser intensity than aggressive war are not criminal under customary international law. Thus, a number of the acts mentioned in the U.N. Definition of Aggression do not entail criminal liability under customary international law. There is no evidence in state practice which would support a different conclusion.¹⁶

B.2. Material Elements of the Crime of Aggression (Aggressive War)

Let me now turn to the material element of the crime of aggression: it requires a certain state act («aggression» against another state), and participation in that act on the part of the individual. Uncertainties concerning the definition of the crime of aggression appear at both levels; however, it is the definition of the «state act» in particular that causes problems.

a. State Act of Aggressive War

It is clear that an «aggressive» war can only be found to exist if the use of armed force is contrary to international law. However, not every belligerent use of military

concept on the basis of the Nuremberg model, and thus affirmed the scope of punishable aggression recognized since the end of World War II, see *Yearbook of the International Law Commission* 1996 II/2, p. 43; M.C. Bassiouni and B.B. Ferencz, in M.C. Bassiouni (ed.), *International Criminal Law*, Vol. 1, 2nd edn. (1999), p. 313 at pp. 337 et seq.

¹⁵ See also I. Brownlie, *International Law and the Use of Force by States* (1963), p. 175. Verbal acts have been granted decisive significance by the ICTY, see *Prosecutor v. Tadić*, ICTY (Appeals Chamber), decision of 2 October 1995, paras. 96 et seq., in order to establish the core norms of international humanitarian law in intrastate armed conflicts. For the Appeals Chamber, official statements by states and the content of national military manuals were enough to show sufficient practice for the emergence of customary international law.

¹⁶ For similar views, see T. Meron, 25 *Suffolk Transnational Law Review* (2001), p. 1 at p. 9; E. Wilmhurst, in G. Politi and M. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004), pp. 93 et seq. For a different view, see A. Cassese, *International Criminal Law*, 2nd edn. (2008), p. 158 et seq., which refers to the U.N. Definition of Aggression in determining applicable customary law.

force suffices: the use of force must reach a certain degree and intensity. What that means must be determined on the basis of the Nuremberg and the Tokyo judgments. These judgments refrained from creating an abstract definition of aggressive war, but they contain some crucial criteria. For example: the German attacks on neighboring states that were tried at Nuremberg were waged by large armies on broad fronts and aimed at total or partial occupation of the victim state. These criteria do not exactly mirror the realities of modern armed conflicts. It is necessary to accept them in principle and to adapt them to the requirements of modern conflicts. This means that the use of force must be of comparable gravity and intensity. Thus, for example, bombardment of the territory of another state which causes extensive damage and loss of lives in the victim state could be of sufficient gravity. In contrast, the blockade of ports and coasts or merely remaining in another state's territory without that state's consent, as mentioned in the U.N. Definition of Aggression, would generally not be an act of aggression for which there is individual criminal responsibility under present customary international law.

What we also learn from the Nuremberg precedent is that aggressive war requires an additional aggressive element. The wars adjudicated in Nuremberg and Tokyo aimed at the total or partial annexation or subjugation of the victim states. The idea that underlies the Nuremberg and Tokyo judgments is that wars such as those fought by Germany and Japan during World War II constitute — due to their scale, gravity and aggressive aims — a manifest and flagrant violation of the prohibition of (aggressive) war. The aggressive aims of a war are generally determined by the government waging the war and can be proven, for example, through statements by the political leadership.¹⁷ It is not necessary that the perpetrator him or herself set the aggressive aims of the war or have a hand in forming them.¹⁸

b. Individual Criminal Responsibility

As far as individual criminal responsibility under customary international law is concerned, it is overwhelmingly accepted today that the crime of aggression is a «leadership crime».¹⁹ The crucial element is the possibility of effective (not

17 Thus, the Nuremberg Tribunal found that Hitler's «Mein Kampf» already contained an «unmistakable attitude of aggression,» which would continue to mark the German Reich and was judged to constitute preparation of aggressive war, see IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, pp. 422 et seq.

18 G. Werle, *Tratado de derecho internacional penal* (2005), marginal no. 1174; G. Werle, *Principles of International Criminal Law* (2005), marginal no. 1170.

19 See G. Westdickenberg and O. Fixson, in J. Frowein et al. (eds.), *Festschrift für Eitel* (2003), p. 483 at p. 503.

necessarily legal) control over the state's political or military actions. The perpetrator does not necessarily have to make the actual decisions on war and peace, but he must take part in activities of major significance for the preparation or execution of a war of aggression.²⁰ According to the Nuremberg and Tokyo Charters, four forms of conduct are punishable as the crime of aggression: planning, preparing, initiating or waging a war of aggression.

B.3. Mental Element

Participation in the planning, preparation, initiation or waging of aggressive war must be intentional. In particular, the perpetrator must be aware of the aggressive aims of the war, but nevertheless continue his or her activities. If the perpetrator acts despite knowledge of the aims of the war, he or she adopts these aims as his or her own and acts with *animus aggressionis*.²¹ Purpose on the part of the perpetrator is not necessary and was not required by the Nuremberg Tribunal.²²

B.4. The Crime of Aggression and International Military Interventions

The number of international military interventions, which have at times been named acts of aggression by critics both in the political and the academic arena, has steadily increased over the years. In detail, one operation may differ significantly from another, and it is impossible to analyze each and every aspect here. The following shall contribute some general remarks on the relevance of the crime of aggression in this context.

Obviously, where a military operation is authorized by the U.N. Security Council under Chapter VII of the U.N. Charter, there is no room for discussion whether this amounts to the crime of aggression. The U.N. Security Council has the primary responsibility for maintaining world peace, and it has the competence to authorize the use of armed force. Authorization by the Security Council thus legitimizes a military operation; it cannot be said that such an operation is

²⁰ See also Y. Dinstein, *War, Aggression and Self-Defence*, 4th edn. (2005), p. 134; E. Brand, 26 *British Yearbook of International Law* (1949), p. 414 at pp. 420 et seq.

²¹ For proof of the mental element, the Nuremberg Tribunal relied primarily on the fact that the defendants had acted despite being thoroughly informed of Hitler's plans; see IMT, judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22, p. 425 and pp. 489 et seq., pp. 491 et seq., also pp. 495 et seq., and p. 499, p. 507, pp. 523 et seq. and p. 526.

²² Cf. G. Werle, *Tratado de derecho internacional penal* (2005), marginal no. 1185; G. Werle, *Principles of International Criminal Law* (2005), marginal no. 1181; *contra* A. Cassese, *International Criminal Law*, 2nd ed. (2008), p. 160.

punishable under international law. As regards humanitarian interventions, e.g. in order to prevent genocide or other serious human rights violations, they do not amount to the crime of aggression. Even if they lack authorization by the Security Council, they cannot be said to constitute an obvious and flagrant violation of international law. In addition, humanitarian interventions lack the aggressive aim, the *animus aggressionis*.

Whether the actions of the «coalition of the willing» against Iraq could be justified under international law as intervention to eliminate a regime that violated human rights violations is open to debate. The United States and Great Britain mainly relied on prior U.N. Security Council resolutions to justify their actions. This argument is controversial.²³ However, it was not a criminal war of aggression even if one agrees that the action was contrary to international law. The Allies did not aim at annexing or subjugating Iraq, or at destroying it as an independent state. Therefore, the war lacked the specific aggressive element necessary under customary international law for a war of aggression.

C. The Crime of Aggression in the Statute of the International Criminal Court

Under Article 5(1)(d) of the ICC Statute, the International Criminal Court has jurisdiction to try the crime of aggression. However, the Court cannot exercise its jurisdiction until the crime of aggression has been defined and its relationship to the U.N. Charter and, in particular, to the Security Council has been clarified.

Ever since the adoption of the ICC Statute, the efforts to reach an agreement on the crime of aggression have continued. In 1998, the Rome Conference authorized the Preparatory Commission to prepare a proposal for consideration by the first Review Conference, which is scheduled for 2010. In 2002, the Assembly of States Parties established a «Special Working Group on the Crime of Aggression» to take over the work from the Preparatory Commission. Both the Preparatory Commission and the Special Working Group have published a number of reports and working papers.²⁴

As far as the definition of the crime of aggression is concerned, the majority in the Special Working Group appears to favor basing it on the U.N. Definition of

23 On the discussion surrounding the legality of the invasion of Iraq, see, e.g., M. Bothe, 14 *European Journal of International Law* (2003), pp. 227 et seq.; E. de Wet, *Humanitäres Völkerrecht-Informationsschriften* (2003), pp. 233 et seq.; M. Sapiro, 97 *American Journal of International Law*, pp. 599 et seq.; S.P. Shamra, 43 *Indian Journal of International Law* (2003), pp. 215 et seq.; A.D. Sofaer, 14 *European Journal of International Law* (2003), pp. 209 et seq.; R. Wedgwood, 97 *American Journal of International Law* (2003), pp. 576 et seq.

24 The documents are available on the website of the International Criminal Court, <www.icc-cpi.int/menu/asp/special+working+group+on+aggression>.

Aggression.²⁵ There seems to be substantial support for including many or all the acts contained in Article 3 of that Resolution under in the ICC Statute. As argued before in this article, this would cover acts that are not punishable under customary international law. However, the tendency to extend the scope of the crime is countered by the inclusion of a threshold upon which the majority agrees: only acts that «by [their] character, gravity and scale, [constitute] a manifest violation of the Charter of the United Nations»²⁶ shall fall within the jurisdiction of the International Criminal Court. This threshold could be used to limit the crime of aggression to its customary law core. It is therefore conceivable that at the end of the day, the crime of aggression under the ICC Statute will not depart too far from what the Nuremberg and Tokyo tribunals found to be a punishable war of aggression.

It appears generally accepted that the crime of aggression under the ICC Statute should require a «leadership element» (irrespective of the mode of participation).²⁷ In order to be found guilty of the crime of aggression, the accused has to «be in a position effectively to exercise control over or to direct the political or military action of a State.»²⁸ This would either be a substantive element of the crime,²⁹ or a precondition for the exercise of jurisdiction by the Court.³⁰ There was some discussion as to whether the leadership clause would also encompass persons which due to their economically powerful position were able to exercise comparable control over the actions of a state.³¹ It was also argued that aggression could also be committed by non-state entities, such as terrorist armed groups or liberation movements. Therefore, the leadership clause should not be confined to control over the actions of a state.³² It appears, however, that both suggestions are no longer being seriously considered. In line with the customary law content of the crime, the majority of states parties favor including the leadership clause as cited above in the substantive definition of the crime.³³

25 Report of the Special Working Group on The Crime of Aggression, ICC-ASP/6/SWGCA/1, para. 14.

26 *Ibid.*, para. 25.

27 *Ibid.*, para. 8.

28 Cf. the proposal in the Annex to the document ICC-ASP/6/SWGCA/1.

29 Cf. *ibid.*

30 Cf. the proposal in the Annex II to the document ICC-ASP/6/SWGCA/INF.1.

31 Cf. K.J. Heller, 18 *European Journal of International Law* (2007), pp. 489 et seq.

32 A. Cassese, *International Criminal Law*, 2nd ed. (2008), p. 157; A. Cassese, 20 *Leiden Journal of International Law* (2007), pp. 847 et seq.; similarly N. Weisbord, 49 *Harvard International Law Journal* (2008), pp. 161 et seq., *passim*.

33 Cf. the document ICC-ASP/6/SWGCA/INF.1 by the Special Working Group on the Crime of Aggression, para. 9, and Report of the Special Working Group on The Crime of Aggression, ICC-ASP/6/SWGCA/1, para. 6.

Probably the most controversial issue under discussion is the role of the Security Council in proceedings on the crime of aggression before the International Criminal Court. The need for granting the Security Council such a role is based, in particular, on the argument that the Security Council has the primary responsibility for world peace and security (see Article 24 of the U.N. Charter) and therefore must be involved in the decision on whether or not an act of aggression has occurred. The proposal currently under discussion provides that the Court can exercise jurisdiction over the crime of aggression in three cases: if the Security Council has determined that an act of aggression has been committed; if the Security Council has decided not to object to the Court's exercise of jurisdiction; or if, instead, the General Assembly or the International Court of Justice has determined an act of aggression.³⁴

From a legal point of view, it would certainly be unsatisfactory if the exercise of jurisdiction over the crime of aggression by the International Criminal Court were possible only in case of approval by a U.N. organ. Where the «supreme crime» is at stake, prosecution should not depend on the reasoning of other organs, possibly political organs of the executive. Participation of the Security Council or the General Assembly carries the risk of politicizing criminal proceedings and making them a political tool and bargain chip. The strong role of the Security Council in determining the Court's jurisdiction over the crime of aggression might result in undue advantages for the five permanent members of the Security Council and their allies, and would thus undermine the Court's impartiality. Finally, it should be kept in mind that until today, the Security Council has never taken the opportunity to denounce an armed attack or conflict as «aggression.»³⁵

II. THE CRIME OF AGGRESSION IN DOMESTIC LAW

A. Domestic Legislation

Another means of prosecuting the crime of aggression is the exercise of jurisdiction by the states. The following section is based on the analysis of approximately 80 domestic criminal codes. Basically, one can distinguish between two categories of provisions: on the one hand, there are domestic provisions which cover aggression as «violations of national security concerns.» Other states include the crime of aggression as such.

³⁴ Cf. the proposed wording of Article 15*bis* in Annex III of the document ICC-ASP/6/SWGCA/INF.1.

³⁵ For a detailed discussion and further references, cf. C. Kress, 20 *Leiden Journal of International Law* (2007), pp. 859 et seq.

A.1. Legislation Protecting State National Security

Provisions on «violations of national security concerns» can be found in numerous (though not all) domestic legal systems. Their scope varies. Many of them cover acts of aggression because the conduct described consists of, *inter alia*, the use of armed force against the national sovereignty or territorial integrity of a state.³⁶ Some provisions even expressly make mention of acts of aggression or aggressive war.³⁷

All of these provisions have one thing in common: they protect primarily national legal values such as the existence of a state, its foreign relations, its independence and sovereignty. Accordingly, their application depends on a number of restrictive conditions, the most important being that usually the state criminalizing the conduct must be affected by it, either as a perpetrator violating the prohibition of the use of armed force against another state or as a victim. Where provisions serve to protect a state's foreign relations with other states, their scope also covers acts in the context of hostilities in which the criminalizing state does not take part.³⁸ Many, if not all of the provisions in question extend to other acts that could not be classified as acts of aggression or even aggressive war, e.g. treason, collaboration with enemy forces, insurgencies.

A.2. Legislation on Crimes against Peace

Only a few states include the crime of aggression as established under international law in their national legal systems. None of the states analyzed have implemented the crime of aggression after ratification of the Statute.³⁹ But this is not surprising as the ICC Statute is still incomplete as regards the crime of aggression.

36 See, for example, *Canadian Criminal Code*, Art. 46(1)(b) and (c); *Criminal Law of the People's Republic of China*, Art. 102; *Código Penal de Cuba*, Art. 110; *Finnish Penal Code*, Chapter 12, Art. 2; *French Criminal Code*, Art. 411-4; *German Criminal Code*, § 80; *Japanese Criminal Code*, Arts. 81, 82; *Mexican Penal Code*, Art.123; *Nigerian Penal Code*, Arts. 37 et seq., 49A-C; *Criminal Code of Tunisia*, Arts. 60(1), 61(1).

37 See, for example, *German Criminal Code*, § 80 («prepares a war of aggression»); *French Criminal Code*, Art. 411-4 («susciter des hostilités ou des actes d'agression contre la France»). See also *Statute of the Iraqi High Tribunal*, Art. 14(c), which criminalizes the «abuse of position and the pursuit of policies that may lead to threat of war or the use of the armed forces of Iraq against an Arab Country.» This provision is based on Iraqi criminal law.

38 See *Austrian Criminal Code*, §§ 316, 320; *Liechtenstein Criminal Code*, § 316; *Swiss Criminal Code*, Art. 300.

39 It should, however, be noted that the author did not have access to the criminal codes of all member states.

Some states, however, criminalize acts in connection with aggression in provisions which were enacted before the ICC Statute. This is the case in 17 of the countries analyzed: Armenia, Azerbaijan, Bangladesh, Belarus, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Macedonia, Poland, Portugal, Republic of Moldova, Russia, Tajikistan and Vietnam. These states include in their laws acts of aggression in chapters on crimes under international law (often labelled «crimes against peace and security of humanity» or «offenses against international values»), usually accompanied by provisions on genocide, crimes against humanity, and/or war crimes.

Here, the crime is mostly specified as «war of aggression,» «aggressive war,»⁴⁰ «war violating international agreements» or simply «war.»⁴¹ With the exception of one case (Croatia), these concepts are not defined by law. Two provisions expressly use the term «crimes against peace,» which points into the direction of, *inter alia*, the Nuremberg Charter.⁴² Here, the precedents of Nuremberg and Tokyo may have functioned as role models for the relevant domestic provisions. The majority of them employs the same or very similar language as far as the criminal conduct is concerned: «planning,» «preparing,» «initiating,» and/or «waging» a war of aggression.

As far as can be seen, there is only one criminal code which extends the definition of the Nuremberg and Tokyo Charters: Croatia uses the term «war of aggression», but in its definition thereof relies on the U.N. Definition of Aggression, including, for example, the blockade of ports or shores.

A.3. Scope of National Jurisdiction

The criminal codes mentioned rarely include the pure universality principle, which some legal experts propagate also for the crime of aggression.⁴³ There are only

40 See *Armenian Criminal Code*, Arts. 384, 385; *Azerbaijani Criminal Code*, Arts. 100, 101; *Bulgarian Penal Code*, Art. 409; *Estonian Penal Code*, §§ 91, 92; *Georgian Criminal Code*, Arts. 404, 405; *Criminal Code of Macedonia*, Art. 415; *Criminal Code of Poland*, Art. 117; *Criminal Code of the Russian Federation*, Arts. 353 et seq.; *Criminal Code of the Republic of Tajikistan*, Arts. 395, 396.

41 See *Bulgaria Penal Code*, Art. 407; *Criminal Code of Hungary*, Section 153; *Criminal Code of Portugal*, Art. 236. Art. 408 of the *Bulgarian Penal Code* criminalizes «provoking armed attack by one country to another.» See also *Criminal Code of the Republic of Albania*, Art. 211, which criminalizes «acts which intent to provoke war or make the Republic of Albania face the danger of a [military] intervention from foreign powers.» From its wording it is not quite clear whether the latter prohibition criminalizes war in which Albania is not involved.

42 See *Bangladesh Acts No. XIX of 1973*, Art. 3(2)(b); *Criminal Code of Latvia*, Section 72. See also *Criminal Code of Azerbaijan*, Art. 12(3) which provides for the application of domestic criminal law to «crimes against peace» etc.; Arts. 100 and 101 containing the relevant offenses speak of «aggressive war.»

43 T. Weigend, *Grund und Grenzen universaler Gerichtsbarkeit*, in: J. Arnold et al. (eds.), *Festschrift für Albin Eser* (2005), p. 972. See also Princeton Project on Universal Jurisdiction (ed.), *Princeton Principles on Universal Jurisdiction* (2001), Principles 1(2) and 2(1).

two states that provide for legislation wide enough to potentially cover aggressive acts committed abroad: Tajikistan, which allows for the application of its criminal laws to foreign nationals if «they have committed a crime provided for by the rules of international law recognized by the Republic of Tajikistan;»⁴⁴ and the Republic of Moldova, which explicitly includes «crimes against peace and security of mankind» in the list of offenses punishable under the universality principle.⁴⁵

Other scholars reject universal jurisdiction for the crime of aggression.⁴⁶ They argue that the notion of aggression can be tremendously politicized, and that therefore leaving it to national courts would lead to abuse and manipulation for political purposes. Thus, only an international court should have jurisdiction over the crime.⁴⁷ This reasoning points to an important problem of domestic prosecution. Determination that an act of aggression has occurred touches upon very delicate and complex questions of international law and politics. If national courts embark upon this task and evaluate the conduct of a foreign state, this could be seen as violation of the principle that one state does not have jurisdiction over another (*par in parem non habet iudicium*). Furthermore, trials of this kind can provoke allegations of political partiality or even victor's justice.

However, it is impossible to deny a state the right of exercising jurisdiction over an act of aggression that the state itself has committed or participated in. Likewise, it is hard to see how one should prohibit prosecution by the state that has become the victim of aggression; after all, jurisdiction based on the protection of state values and integrity is generally acknowledged. Here, it may be useful to compare aggression with war crimes: in regard to the latter, there is no doubt that the victim state is competent to prosecute war criminals of the enemy state. It should also be kept in mind that the International Criminal Court functions on the premise that aggression can and will be tried also on the national level: under Articles 1 and 17 of the ICC Statute, the Court shall exercise its jurisdiction only in situations where the competent states are unwilling or unable genuinely to carry out an investigation or prosecution (principle of complementarity). In principle, third states cannot be denied the right to prosecute aggression, if one accepts that the values protected by the prohibition of aggression are owed to the international community as a whole (*erga omnes*). However, a state that has no specific link to the crime should not prosecute aggression. If the states directly affected refrain from trying the case, jurisdiction should be left to international courts.

44 See *Criminal Code of Tajikistan*, Art. 15(2)(a).

45 See *Criminal Code of the Republic of Moldova*, Art. 11(3).

46 Cf. C. Tomuschat, *The Duty to Prosecute International Crimes Committed by Individuals*, in: H.J. Cremer et al. (eds.), *Festschrift für Helmut Steinberger* (2002), p. 342.

47 *Ibid.*, p. 341.

B. Example: § 80 of the German Criminal Code

Under § 80 of the German Criminal Code, anyone who «prepares a war of aggression [...] in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.» The norm is interesting for two reasons. First, although it mainly protects Germany's internal security and its peaceful relations with other nations, it uses the term «war of aggression» and thus must be interpreted in the light of international law. Consequently, any problem relating to an international definition of the crime of aggression is relevant also to § 80 of the German Criminal Code. Second, the German authorities have recently been called upon to prosecute an alleged violation of this provision. Their reaction sheds some light on the difficulties of domestic prosecutions of the crime of aggression and makes up a valuable piece of state practice in this area.

With § 80 (and § 80a⁴⁸ of the German Criminal Code), the German legislator has met its obligations under Article 26(1) of the German constitution, according to which «[a]cts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense.» That rule is the consequence of Germany's responsibility for World War II. It is primarily meant to ensure that Germany will never again engage in armed hostilities that threaten world peace. For this reason, § 80 of the German Criminal Code is not meant to cover all wars of aggression, but only those in which Germany is supposed to participate.⁴⁹ Furthermore, only preparation of aggressive war is covered, not the actual execution. Although § 80 does not expressly include the «leadership element», it is generally agreed that only persons who are in the position to exercise control over the military actions of the state can be guilty of the crime.⁵⁰

It is generally agreed upon that the term «war of aggression» must be interpreted in accordance with international law. In order to make that notion workable for the purposes of criminal law, most commentators delineate the term by using the customary law criteria, which have been outlined above. Most German legal experts

48 In addition, § 80a of the *German Criminal Code* criminalizes public incitement to a war of aggression.

49 Mainly based on the preparatory works for § 80 of the German Criminal Code, the majority opinion concludes that this provision not only covers cases in which Germany is supposed to act as an «aggressor» against another state, but also if Germany is intended to become the victim of aggression.

50 H.W. Laufhütte/A. Kuschel, in *Leipziger Kommentar: StGB*, Vol. 4, 12th ed. (2007), § 80, marginal no. 15.

seem to doubt that the U.N. Definition of Aggression has comprehensively acquired the status of customary law. Therefore not all of the acts included in Article 3 of that Resolution are regarded as punishable offenses under § 80 of the German Criminal Code.⁵¹

There have been no prosecutions under § 80 of the German Criminal Code so far. In 2003, however, German citizens filed a criminal complaint with the German Federal Attorney General (*Generalbundesanwalt*) alleging that members of the German Federal Government had participated in a war of aggression against Iraq (1) by granting members of the «coalition of the willing» the right to use German air space as well as rights of movement and transport through German territory; and (2) by allowing German soldiers to be on board of (NATO) AWACS airplanes in order to secure the Turkish border with Iraq.⁵²

In the end, the Federal Attorney General turned down the complaints because, in his opinion, there was no reasonable basis to begin investigations (*Anfangsverdacht*). Interestingly, he avoided any evaluation as to whether the conduct of the «coalition of the willing» in Iraq constituted a war of aggression, but instead argued that in any event Germany had not «participated» in such a war since «participation» within the meaning of § 80 of the German Criminal Code required an act of certain gravity, namely the taking part (substantially) in hostilities, e.g. by means of armed forces. Granting the right to use German air space and territory was supposedly not of sufficient gravity in order to be qualified as participation in an aggressive war. As the deployment of German soldiers to AWACS flights over Turkey had been part of a legal NATO operation, it also did not amount to participation in that sense. The Federal Attorney General further argued that by its action, the German government had also not created a danger of war for Germany as required under § 80 of the German Criminal Code.⁵³ In academic debate, this decision has been criticized, in particular, for its interpretation of «participation.»⁵⁴ The majority opinion advocates a wider understanding of this term that would include any act by which Germany «lends a hand» to an aggressive war.⁵⁵

51 Cf. C.D. Classen, in *Münchener Kommentar: Strafgesetzbuch*, Vol. 2/2 (2005), § 80, marginal no. 12; H.W. Laufhütte/A. Kuschel, in *Leipziger Kommentar: StGB*, Vol. 4, 12th edn. (2007), § 80, marginal no. 5 with further references.

52 Information on similar complaints that had been launched in the course of German military deployment to the «Enduring Freedom» operation in Afghanistan in 2001 is available at <www.uni-kassel.de/fb10/frieden/themen/Voelkerrecht/bundesanwalt.html>.

53 See Generalbundesanwalt beim BGH, *Juristenzeitung* 2003, pp. 908 et seq., commented by C. Kress, *Juristenzeitung* 2003, pp. 911 et seq. For details, see C. Kress, 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003), pp. 294 et seq.

54 C. Kress, 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003), p. 294.

55 H.W. Laufhütte/A. Kuschel, in *Leipziger Kommentar: StGB*, Vol. 4, 12th edn. (2007), § 80, marginal no. 10.

III. CONCLUSION

Criminality of aggression under customary international law must be defined along the precedents of Nuremberg and Tokyo. It is limited to intensive use of military force, in manifest and flagrant violation of international law and committed with *animus aggressionis*. The customary law crime of aggression is narrower than the U.N. Definition of Aggression. As regards the crime of aggression under the ICC Statute, it appears that most states favor a definition of the crime that goes beyond what this essay has identified as customary international law. In any event, it is crucial for the Court's impartiality that the determination of aggression is left to the Court and not to the Security Council.

Domestic legislation mostly criminalizes aggressive acts as an offense against national state security; a limited number of states also punish aggression as a crime under international law, mostly with reference to the definition in the Nuremberg Charter. Exercise of universal jurisdiction by third states is not advisable and is hardly provided for in present domestic legislation.

After Nuremberg and Tokyo, there have been no convictions for the crime of aggression, neither on the international nor on the national level. Not even Saddam Hussein was tried for his invasion of Kuwait, which would be a classic case of a war of aggression. Despite the effort to codify the crime of aggression in the ICC Statute, it is very hard to predict whether and when we will see convictions for it in the future.

