The Crime of Aggression between International and Domestic Criminal Law

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Presentation at the XVth International Congress on Social Defence: Criminal Law between War and Peace: Justice and Cooperation in Military Matters in International Military Interventions

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Part 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. This decision was not accessible to legal or even judicial control. 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 or even judicial control.

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**, without resulting in a clear prohibition.

Under Article 1 of the Hague *Convention for the Pacific Settlement of International Disputes* of 1899 and 1907, the parties agreed to settle conflicts peacefully as far as possible. Article 2 of the Convention introduced a mediation process before any resort to weapons, to be undertaken, however, only when circumstances permitted.

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 1919** emphasized the state parties' duty "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 states. To settle disputes that could lead to war, an arbitration system was introduced.

Depending on the character of the dispute, the system provided for a decision by either a court of arbitration or the League of Nations Council. If a state complied with the decision of an arbitrator, no war could be waged against it. The same was true of a unanimous decision of the Council. In any case, three months had to have passed between the decision of the arbitrator or the Council and the beginning of hostilities. If a state refused to

comply with the dispute settlement system, Article 16 of the Covenant provided for imposition of mainly economic sanctions. Overall, however, the prohibition of war in the Covenant was incomplete. Not even aggressive war was subject to an unconditional prohibition. The Covenant also reflected a traditional concept of war, which in particular required the state's intent to bring about a state of war. Thus states could avoid their obligations under the Covenant by claiming, for example, that the conflict lacked *animus belligerendi* and thus was not a war in the formal sense.

In addition, the ***Versailles Peace Treaty* of 28 June 1919** had even 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."[1] However, this new and ambitious model of establishing individual criminal responsibility under international law was ever implemented.

However, the prohibition of war in the Covenant was incomplete. Its deficiencies were to be corrected by the **Geneva Protocol of 2 October 1924**, 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.

The system for prevention of war was expanded on a regional level. In the **Treaties of Locarno of 5 (–16) October 1925**, the State 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**. In the preamble of the pact, the state parties declared their belief **"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. Although it could not prevent the outbreak

[1] See Versailles Treaty, Art. 227(1).

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.

However, 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 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. Because 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.

Following World War II, the prohibition of aggression was significantly expanded in the **UN Charter**. The UN 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." There are two exceptions to this prohibition: the right to self-defence against an armed attack, which is regulated by Article 51 of the UN Charter; and military measures that are based on an authorization by the Security Council under Chapter VII of the UN Charter in the case of a threat to the peace, breach of the peace, or an act of aggression (Article 39).

Thus, under the UN Charter, we can find **several concepts in connection with aggressive acts: "use of force" (Article 2(4)), "armed attack" (Article 51), "threat to peace/breach of peace/act of aggression" (Article 39)**. The exact meaning of these concepts and their relationship to one another are subject to dispute. It is, in particular, the notion of "aggression" as contained in Article 39 of the UN Charter that plays a role in the discussion on the international crime of aggression today.

The term "aggression" has been further explained in the annex to **UN General Assembly Resolution 3314 (XXIX) on 14 December 1974 (the so-called UN Definition of Aggression)**. You can find this definition in your reader on page 2.

Article 1 of the UN 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 armed attack by armed forces, or occupation resulting there from (*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, see or air forces, or 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).

As we shall see, one of the essential questions is whether all the acts contained in the UN Definition are already criminal under customary law or, if not, should be criminalized in the future.

B. Criminality of Aggression under Customary International Law

Let me now turn to the question whether violations of the prohibition of aggression lead to individual criminal responsibility under international law, and which violations this applies to. We will see that a zone of criminal responsibility does exist, but is plainly narrower than the scope of what is forbidden by international law. In other words: we must clearly **distinguish** between **illegality** and **criminality** of acts of aggression. Only aggressive war, as a particularly grave and obvious form of aggression, is criminalized under customary international law.

I. 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.

Article 6 (a) of the Nuremberg Charter declared a crime against peace 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. At the Nuremberg trial of the major war criminals, all 22 defendants were also charged with crimes against peace, and twelve[2] 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. **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.

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*, and thus violated principles of justice. 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. The tribunal thus concluded, from the fact that waging an aggressive war deserved and needed punishment, that it was in fact criminal.

This argument was plausible. Even in the period before World War II, there had long been efforts to criminalize aggressive war. Article 227 of the Versailles Treaty, for example, provided for prosecution of the German Kaiser for unleashing World War I. The aforementioned Geneva Protocol of 2 October 1924 defined aggressive war as an international crime, a formulation that was taken up by League of Nations resolutions and the 6th Pan-American Conference. The stage had thus been set for assigning individual criminal responsibility for aggressive war, as a logical consequence of the proscription of war even before World War II. Any residual doubt as to the lawfulness of criminalizing aggressive war can be eliminated from today's point of view by the fact that even *ex*

[2] Namely, *Göring*, *Hess*, *von Ribbentrop*, *Keitel*, *Rosenberg*, *Frick*, *Funk*, *Dönitz*, *Raeder*, *Jodl*, *Seyss-Inquart* and *von Neurath*.

post facto prosecution would have been permissible: the *ex post facto* prohibition does not prevent holding state leaders accountable for crimes they commit against international law.

At the time, the Nuremberg and Tokyo tribunals were accused of holding the defendants guilty for "crimes against peace" although, so the argument, such crimes had not been in existence when they were allegedly committed (*ex post facto* application). This criticism thus concerned alleged **retroactive punishment**.

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 **UN General Assembly Resolution 95 (I)**. **Article 5 (2), sentence 1, of the UN Definition of Aggression** also stipulates that "a war of aggression is a crime against international peace." The same wording appears in **Principle 1 (2) of the so-called Friendly Relations Declaration** of 1970. 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. Last, but not least, this crime has been included in the **ICC Statute**.

The Nuremberg and Tokyo trials embodied 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.

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 even if they violate Article 2 (4) of the UN Charter or trigger the right of self-defense under Article 51. Thus, many aggressive acts mentioned in the UN Definition of Aggression do not incur criminal liability under customary international law. There is no evidence in state practice which would support a different conclusion.

II. Material Element of the Crime of Aggression (Aggressive War)

Before going into detail on the material element of the crime of aggression, I would like to point out that this crime displays a "structural peculiarity": it requires a certain **state act** ("aggression" against another state), and, of course, **participation** in that act on the part **of the individual**. Uncertainties concerning the definition of the crime of aggression appear on both levels; however, it is the definition of the "state act" in particular, that causes problems.

1. State Act of Aggressive War

Turning to the state act of aggression (that is, in my opinion, "aggressive war"), it is, first of all, clear that an "aggressive" war can only be found to exist if the use of armed is **contrary to international law**.

Second, the **intensive use** of armed force is necessary. Not every belligerent use of military force suffices. In order to qualify as crime of aggression, 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 generally waged by **large armies on broad fronts** and led to **total or partial occupation** of the

victimized state. These criteria may not exactly mirror the realities of modern armed conflicts, but if one intends to stay within the boundaries of customary international law, it is necessary to accept them in principle. It is, however, admissible to adapt these criteria to present requirements as long as **use of force** is involved which is **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 victimized 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 UN Definition of Aggression, would generally not be an act of aggression for which there is individual criminal responsibility.

Third, aggressive war requires an additional **aggressive element,** the so called ***animus aggressionis***. The wars adjudicated in Nuremberg and Tokyo aimed at the total or partial annexation or subjugation of the victimized states.

The aggressive element should also be assumed if the aggressor state aims at the total or partial elimination of the victimized state or its population. Such a case can be compared to the Nuremberg and Tokyo precedents because elimination probably amounts to the utmost degree of control that one state can aspire over the sovereignty of another state.

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. This criterion must play a central role in any effort to define the crime of aggression today.

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 (e.g., Hitler's *Mein Kampf*); it is not necessary that the perpetrator him- or herself set the aggressive aims of the war or have a hand in forming them.

2. Individual Criminal Responsibility

As far as individual criminal responsibility is concerned, it is overwhelmingly accepted today that the crime of aggression is a **"leadership crime."** Although the Nuremberg and Tokyo charters (as well as Control Council Law No. 10) did not contain explicit limitations on the class of perpetrators, the tribunals only found political or military leaders guilty of crimes against peace. The crucial element is the possibility of **effective** (not necessarily legal) **control or leadership** 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.

The Nuremberg and Tokyo Charters included four forms of criminal conduct: **planning, preparation, initiation or waging** of a war of aggression. These acts are essentially oriented around the **development stages of the crime**. They have a double function: On the one hand, they describe the scope of the state act of aggression; on the other hand, they outline the activities, participation in which leads to individual criminal responsibility.

III. 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*.

IV. The Crime of Aggression and International Military Interventions

The number of international military interventions, i.e. multilateral armed operations in foreign states, 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. I would like to contribute some general remarks on the relevance of the crime of aggression for such operations.

Where a military operation is **authorized by the UN Security Council under Chapter VII** of the UN Charter, there should be no room for discussion of aggression. The UN Security Council has the main responsibility for world peace, and it has the primary 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 contrary to international law.

It is furthermore a matter of controversy whether decisions of the Security Council are open to judicial review; it can be assumed that courts will be rather careful to question the Council's competencies. Finally, also a military operation based on an "unlawful" Security Council mandate would appear legitimate at first sight and thus could not be said to amount to a flagrant and obvious violation of international law.

A similar case exists for so called **humanitarian interventions**. e.g. to prevent genocide or other serious human rights violations. Although one of their features is the lack of authorization by the Security Council, it cannot be said that they constitute an obvious violation of international law. And, obviously, humanitarian interventions definitely **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 doubtful. The United States and Great Britain relied mainly on prior UN Security Council resolutions to justify their actions. This argument is controversial. However, it was not a criminal war of aggression even if one agrees that the action was contrary to international law. For the Allies were not interested in annexing or subjugating Iraq. The war lacked the

specific aggressive element necessary under customary international law for a war to be one of aggression.

Additional Information: As you know, it is basically argued that **Resolution 678 of 29 November 1990** – thus going back to the conflict in Kuwait – empowers the UN member states "*to use all necessary means [. . .] to restore international peace and security in the area*. A later resolution (Resolution 687 of 3 April 1991) declared Iraq's partial disarmament (in particular, of all biological and chemical weapons) to be one requirement for the restoration of peace and security in the region. Resolution 1441 of 8 November 2002 is understood to have reactivated the mandate in Resolution 678 because it was established that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including resolution 687". Therefore, so the argument runs, the Coalition of the Willing was authorized to employ military force against Iraq.

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, as stipulated in Article 5(2) of the ICC Statute, the Court cannot exercise its jurisdiction until the crime of aggression has been defined and its relationship to the UN Charter and, in particular, to the Security Council has been clarified.

Ever since the adoption of the ICC Statute, the efforts to reach agreement on the crime of aggression have continued. In 1998, the Rome Conference authorized the Preparatory Commission to prepare a proposal for consideration by a Review Conference. 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. Relevant excerpts of the most recent documents amongst them have been included in your reader (pages 4 et seq.), the documents as a whole can be accessed on the website of the International Criminal Court.[3]

I do not intend to analyze in detail the discussions and forthcomings on the crime of aggression within the framework of the International Criminal Court.

[3] *See* <http://www.icc-cpi.int/asp/aspaggression.html>.

Any legal outcome will be decided at the first Review Conference on the ICC Statute, which will probably take place in 2010. Thus, I would only like to draw your attention to a few interesting aspects under consideration at the moment.

As far as the **definition of the crime of aggression** is concerned the majority in the Special Working Group appears to favour basing it on the **UN Definition of Aggression**. 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 I have argued before, this would cover acts that are not punishable under customary international law. Admittedly, however, this problem may be alleviated by including a threshold, which the majority agrees upon: only acts that "by [their] character, gravity and scale, [constitute] a **manifest violation** of the Charter of the United Nations" shall fall into the jurisdiction of the International Criminal Court. Finally, it appears generally accepted that the crime of aggression under the ICC Statute should require a **"leadership element"** (irrespective of the mode of participation). In order to be found guilty of the crime of aggression, the accused thus would have to "be in a position effectively to exercise control over or to direct the political or military action of a State".

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 any such a role at all 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 UN Charter) and therefore must be involved in the decision on whether or not an act of aggression has occurred. How that role should look like and how it would affect proceedings before the International Criminal Court is not yet clarified. There are various alternatives, which you can find in the "Chairman's discussion paper" on page 5 of your reader.

Suffice it here to say that in my opinion it is **not indispensable to involve the Security Council** (or the General Assembly) in proceedings before the International Criminal Court. If the definition of the crime of aggression stays within the boundaries of customary international law, that is, the precedents of Nuremberg and Tokyo, the **Court itself may determine** the existence of a criminal war of aggression. Using a broader definition of aggression, however, naturally leads to the question of who should have priority in determining whether an act of aggression has occurred. Participation of the Security Council carries with it the risk of politicizing criminal proceedings. Not only is the Security Council no judicial organ, it also functions according to a voting system that provides some of its members with a veto power and therefore the possibility to prevent a case before the International Criminal Court. In addition, 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".

In sum, it is questionable that involvement of the Security Council or any other organ would make punishing of the crime of aggression any more workable and impartial.

Part II. The Crime of Aggression in Domestic Law

A. Domestic Legislation

In the framework of this presentation it was impossible to assess comprehensively how many states provide for punishment of acts of aggression under domestic law. However, via the domestic legislation database of the International Committee of the Red Cross and some other sources, I have been able to analyse the criminal codes of about 80 or so states. I have made the following observations.

Basically, one can distinguish between **two categories of provisions**:

I. Legislation Protecting State National Security

One the one hand there are domestic provisions criminalizing **"violations of national security concerns"**. Such provisions can be found in numerous (though not all) domestic legal systems. Their scope varies. Many of them cover at least certain 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**.[4] Some provisions even expressly make mention of acts of aggression or aggressive war.[5]

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.[6] 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.

II. Legislation on Crimes against Peace

Only a few states include the crime of **aggression as established under international law** in their national legal systems. I have not been able to find

[4] *See*, for example, ***Canada*** *Criminal Code*, Art. 46(1)(b) and (c); *Criminal Law of the People's Republic of* ***China***, Art. 102; *Codigo Penal de Cuba*, Art. 110; *Finland Penal Code*, Chapter 12, Art. 2; *French Criminal Code*, Art. 411-4; *French Criminal Code*, Art. 411-4; *German Criminal Code*, § 80; *Japan 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).

[5] 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 Iraqui High Tribunal*, Art. 14(c), which criminalizes "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.

any member state of the ICC Statute, which has implemented the crime of aggression after ratification of the Statute (it should be added, however, that no complete access to the criminal codes of all member states was possible). The reason for this may be that, due to the *principle of complementarity*, national implementing legislation frequently mirrors the **ICC Statute**, which is still **incomplete** as regards the crime of aggression.

Some states, however, criminalize acts in connection with aggression in provisions which were enacted before the ICC Statute. I have found that to be the case in **17 countries**: 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"**,[7] "war violating international agreements" or simply "war".[8] 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**.[9]

There is another indication that 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:

[6] *See Austrian Criminal Code*, § 316, 320; *Liechtenstein Criminal Code*, § 316; *Swiss Criminal Code*, Art. 300.
[7] *See Republic of Armenia Criminal Code*, Arts. 384, 385.; *Azerbaijan Criminal Code*, Arts. 100, 101; *Bulgaria Penal Code*, Art. 409; *Estonia Penal Code*, §§ 91, 92; *Georgia Criminal Code*, Arts. 404, 405; *Criminal Code of Macedonia*, Art. 415; *Criminal Code of Poland*, Art. 117; *Criminal Code of the Russian Federation*, Arts. 353f.; *Criminal Code of the Republic of Tajikistan*, Arts. 395, 396.
[8] *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.

"planning", "preparing", "initiating", and/or waging" a war of aggression. Not all of these activities are criminalized in every criminal code, some provisions are limited to, for example, planning and preparing aggressive war.[10] Also, there are some criminal codes, such as those of Hungary and Portugal, which only cover "incitement" for war (see also Section 80 of the German Criminal Code). Nevertheless, Nuremberg and Tokyo seem to have influenced the creation of these laws.

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 **UN Definition of Aggression**, including, for example, the blockade of ports or shores.

The **leadership element** is nowhere expressly mentioned, but it could be incorporated by way of interpretation in light of (customary) international law.

III. Scope of National Jurisdiction

The criminal codes mentioned **rarely** include the "unlimited"/"real" **universality principle**, which some legal experts advocate also for the crime of aggression.

If crimes are committed abroad by citizens of foreign nationality, application of domestic criminal law often requires that the crime was directed against the interests or values of the state or its citizens.[11] Some countries allow for application of domestic law to crimes, which are included in binding international treaties irrespective of where, by whom or against whom they were

[9] *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".

[10] *See Estonia Penal Code*, Art. 91 („leading or participating in preparations of a war of aggression"); *Criminal Code of the Republic of Tajikistan*, Art. 395 ("planning or preparation of an aggressive war"). *See also Criminal Code of Macedonia*, Art. 415, which covers instigation only. The same applies to *Criminal Code of Hungary*, Section 153 ("incitement").

[11] *See Criminal Code of Armenia*, Art. 15(3)2); *Criminal Code of Belarus*, Art. 6(2) *Criminal Code of Croatia*, Art. 14(3); *Criminal Code of Georgia*, Art. (3); *Criminal Code of Latvia*, Section 4(3)*; Criminal Code of the Russian Federation*, Art. 12(3);

committed,[12] or apply the universality principle to certain specified offenses. Aggressive war, however, is not included.[13] There are only 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;"[14] and the Republic of **Moldova**, which explicitly includes "crimes against peace and security of mankind" in the list offenses punishable under the **universality principle**.[15]

According to some legal experts, universal jurisdiction for the crime of aggression is "inconceivable". Given that the notion of aggression can be tremendously politicised, leaving it to national courts would essentially lead to abuse and manipulation for political purposes. Thus, only an international court should have jurisdiction over the crime.[16]

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 preclude a state from 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 forbid prosecution by the state that

[12] *See Criminal Code of Armenia*, Art. 15(3)1); *Criminal Code of Georgia*, Art. (3); *Criminal Code of Estonia*, § 8; *Criminal Code of Latvia*, Art. 4(4), *Criminal Code of Hungary*, Section 4(1)(c); *Criminal Code of Poland*, Art. 5; *Criminal Code of the Russian Federation*, Art. 12(3); *Criminal Code of Vietnam*, Art. 6(2).
[13] *See Criminal Code of Belarus*, Art. 6 (3)
[14] *See Criminal Code of Tajikistan*, Art. 15(2)(a).
[15] *See Criminal Code of the Republic of Moldova*, Art. 11(3).
[16] *See* C. Tomuschat, *Duty to Prosecute International Crimes Committed by Individuals*, in: Cremer et. al (ed.), FS Steinberger, pp. 341 et seq.

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 all other cases, though, jurisdiction is better be left to international courts. Should national courts still choose to make use of the universality principle, they may have to assess very carefully whether all of the acts of aggression as enumerated in Article 3 of the UN Definition of Aggression are already anchored in customary international law.

B. Example: § 80 of the German Criminal Code

§ 80 of the German Criminal Code 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 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.

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."[17]

With § 80 (and § 80a of the German Criminal Code) the German legislator has met its obligations under **Article 26 subsection (1), of the German constitution** (the so called "Basic Law"), 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 the two World Wars. 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 each and all wars of aggression, but only those in which **Germany is supposed to participate**.[18] 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.

It is generally agreed 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, the vast majority delineates the term by using the criteria, which I have outlined above: there must be a flagrant and obvious violation of the international prohibition to use armed force which serves to bring about results such as annexation or subjugation of another state. Most German legal experts seem to doubt that the UN Definition of Aggression has comprehensively acquired the status of customary law, therefore not all of the

[17] In addition, § 80a of the *German Criminal Code* criminalizes public incitement to a war of aggression.
[18] 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.

acts included in Article 3 of that Resolution are regarded as punishable offenses under § 80 of the German Criminal Code.

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.[19]

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 a certain gravity, namely the **taking part (substantially) in hostilities, e.g., by means of armed forces**. In contrast, 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 employment 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.[20]

[19] 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 <http://www.uni-kassel.de/fb10/frieden/themen/Voelkerrecht/bundesanwalt.html>.

[20] 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.

In the literature, this decision has been frequently criticised, in particular, for its interpretation of "participation". The majority opinion advocates for a wider understanding of this term that would include any act by which Germany "lends a hand" to an aggressive war.

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 UN Definition of aggression.

As regards the ICC, determination of aggression should be left to the Court and not to the Security Council.

Domestic legislation presently may criminalize aggressive acts as an offence against national state security; a limited number of states also punish aggression as a crime under international law, mostly indicating reference to the definition in the Nuremberg Charter. Exercise of universal jurisdiction by third states would not be 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, I do not dare to make a prognosis as to whether and when we will see convictions for it in the future.