WHATEVER HAPPENED TO CRIMES AGAINST PEACE?

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1 INTRODUCTION

The concept of *crimes against peace* was first introduced in article 6(a) of the Charter of the International Military Tribunal at Nuremberg.[1] It stipulated individual criminal responsibility for a series of acts connected with the commission of 'war of aggression' or a war in violation of international treaties or agreements or assurances. In particular, the planning, preparation, initiation, waging and the participation in a common plan or conspiracy for the accomplishment of the acts mentioned above. The Nuremberg and Tokyo trials of major German and Japanese war criminals, certain trials before special US[2] and French military tribunals[3] and municipal courts[4] in some states immediately after the war, have been the only instances of criminal prosecution and punishment of individuals in respect of crimes against peace. Thereafter, there has not been a single case of prosecution for post-1945 instances of resort to armed force either on the domestic or the international plane. This fact has led some commentators to argue that the concept of crimes

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[1] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, 8 August 1945, text in D. Schindler & J. Toman, *The Laws of Armed Conflicts* (3rd ed.,1988) 911–919. Historically individuals have been held responsible for violations of international peace. Thus, Napoleon Bonaparte was exiled twice to Elbe and St. Helena by the victorious anti-French coalition, and art. 227 of the Peace Treaty of Versailles (1919) contemplated the prosecution of Kaiser William II of Germany for initiating war in violation of international treaties. See *In re Weizsaecker et. al (Ministries Trial), US Military Tribunal at Nuremberg, 14 April 1949,* 16 ILR 344, 348–349; R. Wolfrum, 'Enforcement of International Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 517, 518 n.9, 520 n.13. However, neither of these individuals stood trial and the Nuremberg Tribunal was the first of its kind on the international plane in subjecting to trial persons for crimes under international law.

[2] *In Re von Leeb et al. (German High Command Trial), US Military Tribunal at Nuremberg, Germany, 28 October 1948,* 15 Ann. Dig. 376; *In Re Krupp et. al., US Military Tribunal at Nuremberg, Germany, 30 June 1948,* 15 Ann. Dig. 620; *In Re Krauch et. al. (I.G. Farben Trial), US Military Tribunal at Nuremberg, Germany, 29 July 1948,* 15 Ann. Dig. 668.

[3] *In Re Roechling et al., General Tribunal of the Military Government for the French Zone of Occupation in Germany, 30 June 1948,* 15 Ann. Dig. 398.

[4] *In Re Takashi Sakai, Nanking, Chinese War Crimes Military Tribunal of the Ministry of National Defence, 1946,* 13 Ann. Dig. 222.

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against peace appears to have been substantially weakened.[5] Indeed, this view appears to be reinforced by the non-inclusion of the crimes against peace under the jurisdiction of the International Criminal Tribunal for Former Yugoslavia (ICTY), in spite of the fact that rump Federal Republic of Yugoslavia and Croatia provided substantial assistance to the Bosnian Serbs and Bosnian Croats in their struggle against the Government of Bosnia-Herzegovina. Moreover, although the crime of aggression falls within the jurisdiction of the International Criminal Court (ICC) [article 5(1)(d) ICC Statute], the Court shall not be seized until 'a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations' [article 5(2) ICC Statute].

The complete lack of prosecution of crimes against peace is unsatisfactory and may give rise to pessimism. It is submitted, however, that it may not necessarily signify an abandonment altogether of the concept in international law. The following preliminary observations seem pertinent.

First, crimes against peace, in particular, aggression, have not been refuted in state practice. They are included in documents, which, though not binding as such, appear to reflect in principle a desire on the part of states to deal with them. The Nuremberg formulation of crimes against peace was included *verbatim*, apart from the Charter of the Tokyo International Military Tribunal,[6] in General Assembly Resolution 95 (I) of 11 December 1946[7] and the work of the International Law Commission.[8] Moreover, General Assembly Resolutions 2625 (XXV) and 3314 (XXIX) state that a 'war of aggression' is an international crime. Finally, the crime of aggression continues to feature in article 16 of the Draft Code of Offences Against the Peace and Security of Mankind (1996) and article 5(1)(d) of the Statute of an International Criminal Court (1998). What becomes clear from the above documents, is that 'aggression' or 'war of aggression' or war in violation of international treaties is a fundamental element of crimes against peace, on the basis of which individual criminal responsibility is evaluated.

Secondly, war crimes and crimes against humanity arising from the second world war have been prosecuted on the domestic plane in a fairly regular manner since

[5] See S.R. Ratner, 'Crimes Against Peace', in R. Gutman & D. Rieff (eds.), *Crimes of War* (1999) 109; M.C. Bassiouni, 'Historical Development of Prosecuting Crimes Against Peace', in M.C. Bassiouni (ed.), *International Criminal Law, Vol. III, Enforcement* (1987) 25, 27; B. Rölling & A. Cassese, *The Tokyo Trial and Beyond* (1993) 86, 104; J.F. Murphy, 'Crimes Against Peace at the Nuremberg Trial', in G. Ginsburgs & V.N. Kudriavtsev, *The Nuremberg Trial and International Law* (1990) 141, 153.

[6] Charter of the International Military Tribunal for the Far East, Article 5(a), text in 15 Ann. Dig. 356, 357.

[7] Text in D. Rauschning-K. Wiesbrock-M. Lailach, *Key Resolutions of the United Nations General Assembly 1946–1996* (1997) 429.

[8] Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the ILC, 1950, Principle VI (a).

1945.[9] But there have been less frequent cases of such prosecutions with respect to other post-1945 conflicts[10] and none on the international plane until the creation of the Yugoslavia (1993) and Rwanda (1994) Tribunals. In particular, despite the existence of the Genocide Convention since 1948, it was not until the creation of these Tribunals that the crime of genocide was prosecuted. Thus, lack of prosecution for a long time may not necessarily signify an abandonment of the propriety of prosecuting international crimes, including crimes against peace.[11]

Thirdly, the failure to prosecute crimes against peace should be sought into the constituent element of the crime and the precision with which this is defined, rather than a conscious option to decriminalize acts against peace altogether. The issue with respect to war crimes and crimes against humanity is what particular acts should fall under both concepts. Once this is achieved their definition is possible with precision. Moreover, they refer to specific acts, which are objectively abhorrent both as a matter of domestic and international law. Crimes against peace have at their root state activity against another state, namely the use of armed force, the lawfulness or not of which may not be free from controversy. Unlawful use of force is a prerequisite for individual responsibility for crimes against peace. However, the question arises whether any unlawful use of force should give rise to such responsibility. Indeed, defining certain conduct as criminal under international law may subject certain government activity to criminalization. Therefore, every state has an interest in the precise definition of international crimes because no state would wish to see its officials prosecuted for acts it is not certain are criminal in advance. Thus, the Chinese representative in the Sixth Committee of the General Assembly expressed his Government's concern at the precise scope of crimes against humanity under the ICC Statute.[12] Equally, the Government of Israel voted against the ICC Statute at the Rome Conference of 1998. This was because the transfer of population to an occupied territory (an activity practised by Israel with respect to Jewish settlements in the Arab occupied territories after 1967) was criminalized as a war crime under its terms.[13]

[9] See, for instance, *Public Prosecutor v Menten* (The Netherlands), 75 ILR 331; *Fédération Nationale des Deportés et Internés Résistants et patriotes at al. v Barbie* (France), 78 ILR 125; *Artukovic v Rison,* (USA), 79 ILR 383; *R. v Finta* (Canada), 82 ILR 425, 98 ILR 520; *Polyukhovich v Commomwealth of Australia and Another* (Australia), 91 ILR 3; *Attorney General of the Government of Israel v Eichmann* (Israel), 36 ILR 5; *Demjanjuk* case (Israel), reported in (1994) 24 *Israel YHR* 323.

[10] E.g. *US v Calley*, US Court of Military Appeals, 1973. 48 C-M Rep. 19, with respect to the Vietnam conflict; *Pius Nwanga v The State* (Nigeria) 52 ILR 494, concerning the Biafra conflict.

[11] See D. Sarooshi, 'The Statute of the International Criminal Court' (1999) 48 *ICLQ* 387, 400. But see A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 144, 146–147.

[12] Statement by Mr. Qu Wensheng of the P.R. China Delegation at the Rome Conference on the Establishment of an ICC, Sixth Committee, 21 October 1998, <http://www.un.int/china/court.htm> tab. 3.

[13] Rome Statute of an International Criminal Court. Some Questions and Answers, <http://www.un.org/law/icc/statute/iccq&a.htm> tab. 2.

Fourthly, the perpetrators of war crimes and crimes against humanity include a wide range of individuals, the apprehension and custody of whom may be easily achieved. By contrast, the perpetrators of crimes against peace, though easily identifiable, are extremely difficult to apprehend.

Finally, the prosecution of crimes against peace constitutes one way of dealing with the use of force by a state, the other being the imposition of sanctions by the Security Council or a regional organization against a recalcitrant state. Therefore, states have an alternative to deal with matters concerning international peace and security and the question is which of the two is to be preferred.

The purpose of this article is to inquire into the lack of prosecution of crimes against peace by inquiring into a) 'aggression' or 'war of aggression' as an important element of criminal conduct and b) by identifying certain grounds that may show a tendency in state practice not to prosecute crimes against peace.

2 AGGRESSION

According to article 16 of the ILC Draft Code of 1996 and 5(1)(d) of the ICC Statute, individual criminal responsibility for crimes against peace refers to the crime of aggression. Moreover, aggression is an international crime if it amounts to a 'war of aggression' by virtue of the Charters of the Nuremberg and Tokyo Tribunals, General Assembly Resolutions 2625 (XXV) of 1970 and 3314 (XXIX) of 1974. The stipulations in the Nuremberg and Tokyo Charters, the ILC Draft and the ICC Statute refer to individual criminal responsibility, whereas the two General Assembly resolutions concern action by states. This gives rise to particular issues with respect to the establishment of crimes against peace: (1) the question of where precisely criminality lies, the act of an individual or the action by his state on the international plane; (2) the question of the body that determines and the criteria for determining the occurrence of aggression.

2.1 Where Exactly Does Criminality Lie?

For an individual to be prosecuted for crimes against peace, he must be involved in planning, the preparation, initiation or waging of a war of aggression. Furthermore, such a war of aggression must be resorted to by the individual's state against another state or states. Consequently, what there really exists is the convergence of two different activities that entail different kinds of responsibility. Moreover, this responsibility is incurred by separate acts in each case. The International Military Tribunal at Nuremberg appears to have merged these activities into an inextricable whole, by ruling that one of them could not exist without the other. The Judgment of the Tribunal Stated that '. . . crimes against international law are committed by men, not by abstract entities . . .'[14] In the case of war crimes, crimes against

[14] *International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946*, (1947) 41 *AJIL* 172, 221.

humanity and genocide, international law imposes obligations on states to refrain from acts that are actually committed by individuals on the ground. Such acts create simultaneously state responsibility and individual criminal responsibility. Therefore, criminality is inextricably bound with the violation by a state of obligations towards other states. In other words, one single activity pertains to both a state and individuals. In the case of crimes against peace, on the other hand, there are two different acts by different actors, with the act committed by a state standing as a prerequisite for the criminal responsibility of individuals. As a matter of fact it is the individual decision-making and action that gives rise to a war of aggression by a state. However, as a matter of law, the establishment of criminal responsibility of individuals rests on the event of a war of aggression by a state, according to international law. Therefore, does the root of criminality lie in the action by states?

Aggression or 'war of aggression' means the use of armed force between states.[15] In principle it is a violation of the rule of customary law and peremptory norm of international law,[16] which is enshrined in the Pact of Paris (1928) and in article 2(4) of the UN Charter, that states must refrain from the use of armed force. Thus, the use of armed force on the international plane is an inter-state phenomenon. The prohibition of the use of force by states is subject to certain exceptions. First, states may resort to unilateral military action in self-defence, under article 51 of the UN Charter and customary law. Secondly, states may undertake action authorized by the UN Security Council under chapter VII or chapter VIII of the Charter or, arguably, by the General Assembly under the Uniting for Peace Resolution (GA Res. 377 (V) of 1950). The scope of the permissible unilateral resort to force is surrounded by controversy. So is the scope of the prohibition of the use of force under article 2(4) of the Charter. Moreover, the controversy is magnified by assertions of lawful resort to force, which are not provided in the UN Charter, but are claimed to exist under customary law. These are the unilateral resort to force for the protection of nationals abroad, humanitarian intervention, the intervention at the request of the government of a state or under the provision of a treaty. Furthermore, the unilateral resort to force to enforce prior Security Council resolutions adopted under chapter VII of the Charter appears to constitute a recently purported ground for the lawful use of force – namely the joint UK/US action against Iraq in December 1998 and the NATO action in Kosovo in March 1999.

State practice in the period after 1945 reveals that whenever states have used force they have always justified it on the basis of an exception to the prohibitive

[15] Article 1, UN Definition of Aggression, GA Res. 3314 (XXIX) of 14 December 1974, GAOR 29th session, Suppl. No 31, 142. It is noteworthy that the threat of force is excluded from the notion of aggression. This seems to be in line with the Judgment of the Nuremberg Tribunal with respect to the cases of incorporation of Austria and Czechoslovakia by Nazi Germany in 1938 and 1939. The Tribunal ruled that they did not constitute instances of aggressive wars but aggressive steps 'in furthering the plan to wage aggressive wars against other countries', (1947) 41 *AJIL* 172, 192–196. See C. Antonopoulos, *The Unilateral Use of Force by States in International Law* (1997) 97 n.21; But see I. Brownlie, *International Law and the Use of Force by States* (1963) 211–212.

[16] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits),* ICJ Rep. 1986, 14, 100–101, para. 190 (hereinafter *Nicaragua* case).

rule,[17] with the invocation of the right of self-defence featuring prominently. It is submitted, therefore, that what really matters when inquiring into the commission of aggression is whether a particular instance of the use of force is or is not lawful. Furthermore, this is an issue of evaluating the justification offered by the state that has resorted to force. This does not appear, however, to be the process followed. Instead, there has been an endless quest of attempting to define aggression by states in advance as an *a priori* contingency of illegality. Then, by asserting, though not defining, that a 'war of aggression' is an international crime, it is suggested that what is really criminal, is the action committed by a state. Individual criminal responsibility does not appear, therefore, to be founded on an act committed autonomously by a person. Rather, it seems to rest on a form of complicity to what is already a criminal act committed by a state. This may be a very convenient method of establishing individual criminal responsibility, but it may give rise to objection. In the case of Nuremberg and Tokyo it was strongly disputed whether unlawful resort to force by a state (let alone action in violation of an existing definition of aggression) entails automatically individual criminal responsibility without separately establishing the latter. In this respect, the Nuremberg Judgment, the ruling of which on the matter was adopted *verbatim* by the Tokyo Tribunal, appears *prima facie* to give rise to confusion. In stating the position in law, the Nuremberg Tribunal ruled that when a state has acted unlawfully, individuals whose acts led to this illegality bear criminal responsibility.[18] However, when the Tribunal proceeded to allocate this responsibility to individual defendants, it appears to have relied on the precise nature of the defendant's participation in the actual commission of illegality under international law by Nazi Germany.[19] In the Nuremberg trial the objection was asserted by Defence Counsel on the basis of the general principle *nullum crimen sine lege.* The International Military Tribunal relied on the unlawfulness of the use of force used by Nazi Germany, the matter-of-fact decision making by individuals leading to the use of force and an analogy with Hague Convention IV of 1907.[20] In particular, it was ruled that, as the Hague Convention makes no express provision for individual criminal responsibility for its violations, and yet there has not been any objection for such responsibility for war crimes, the same must hold in relation to the Pact of Paris.[21] In the case of the Tokyo tribunal the criminality of war of aggression provoked two dissenting opinions to the tribunal's Judgment by Judges Pal of India and Röling of the Netherlands.[22] The Nuremberg finding, although it attracted no dissent from the bench, was criticized in the literature following the trial.[23]

It appears that it was this criticism that led to the resumption of the attempts at

[17] *Nicaragua Case(Merits),* ICJ Rep. 1986, 14, 98, para.186.
[18] (1947) 41 *AJIL* 172, 217 *et seq.*
[19] *Ibid*., 272 *et seq.*
[20] *Ibid*., 218–219.
[21] *Ibid*.
[22] 15 Ann. Digest 356, 375, 376.
[23] See, G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II, The Law of Armed Conflict* (1968) 488–489; G. Finch, 'The Nuremberg Trial and International Law' (1947) 41 *AJIL* 20, 26–34; L.S. Sunga, *The Emerging System of International Criminal Law* (1997) 46–48.

defining aggression by the UN. In fact, the work of the ILC on a Draft Code against the Peace and Security of Mankind was suspended in the 1950s until a consensus definition of aggression was agreed on. This was finally achieved by the adoption of General Assembly Resolution 3314 (XXIX) in 1974. Or it appeared so. For the 1974 definition referred to acts of aggression committed by states and it was purported to serve as a guide to the Security Council in discharging its primary responsibility for the maintenance of international peace and security under chapter VII of the UN Charter. At the same time the 1974 definition provided that 'a war of aggression is an international crime' without elaborating on what precisely a war of aggression consisted of. There was also no particular reference to how individual responsibility was to be incurred. Moreover, the 1974 definition maintained the controversies surrounding the prohibition of the use of force and its permissible exceptions.[24] But what is important, is the strong suggestion that the criminality of aggression is to be sought at the level of state action. Therefore, the consensus definition of 1974 appears to be rather the maintenance by consensus of the differences in state practice concerning the use of force. The same trend of insisting on a definition of aggression in advance subsisted in the preparatory work of the ICC Statute. And it became evident that no generally accepted definition of aggression could be achieved[25] and continued even after its signature at the Rome Conference in 1998. The majority of delegations agreed that aggression should be included in the jurisdiction of the new ICC.[26] To hold otherwise would be a major repudiation of the Nuremberg Principles. Again the presumption of individual criminal responsibility appears to be deemed as a direct result of a criminal act by a state, not an autonomous self-contained act premised on the condition that the state acted unlawfully. And the efforts in the context of the ICC Preparatory Committee appear to follow the course of the UN General Assembly in the 1960s and '70s, namely, the suggestion of alternative definitions without resolving the major controversies surrounding the use of force by states.[27]

[24] J. Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 *AJIL* 224, 224–226.

[25] V. Morris & M. Christianne Bourloyannis-Vrailas, 'The Work of the Sixth Committee of the United Nations General Assembly' (1996) 90 *AJIL* 491, 496; C.K. Hall, 'The First Two Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1997) 91 *AJIL* 177 at 179.

[26] C.K. Hall, 'The Third and the Fourth Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124, 129.

[27] Preparatory Commission for the International Criminal Court, Proceedings of the Preparatory Commission at its fifth session (12–30 June 2000), PCNICC/2000/L.3/Rev. 1, <http://www.un.org/law/icc> 8–9, 11. There have been two options for a definition of aggression before the Commission. Option 1 is premised on the 1974 Definition of Aggression and has three variations. Variations 1 and 2 seem to be based on article 1, while Variation 3 appears to rely on article 3 of the 1974 Definition. Variation 2, in particular, introduces a very narrow concept of 'aggression' by defining it as an 'armed attack' resulting in the occupation or annexation of another state's territory. Option 2 is premised on the Charter of the Nuremberg Tribunal. It defines the crime of aggression in terms of an individual's acts of 'planning, preparing, initiating or carrying out a war of aggression'. Moreover, option 2 requires that the United Nations Security Council must determine in advance that an act of aggression has been committed.

That states may incur criminal responsibility was provided in article 19 of the ILC Draft Articles on State Responsibility. The proposition has met with criticism both by governments[28] and in the literature[29] and the ILC has deleted it from the Draft.[30] Moreover, in the 1996 Draft Code of Crimes against the Peace and Security of Mankind the ILC has laid emphasis on the role and involvement of individuals in aggression committed by a state, as a separate act not linked with an *a priori* definition of state aggression. It is submitted that an individual's responsibility for crimes against peace is totally separate from a purported crime committed by a state.[31] Rather, it rests on his particular involvement in an unlawful act committed by a state. For what appears to be punishable in relation to the individual is not the use of force as such by the state, but his particular involvement in making this use of force happen on the international plane. This is supported by the findings of the Nuremberg and Tokyo tribunals concerning the evaluation of the indictment for crimes against peace in relation to individual defendants. To insist upon formulating a definition of aggression committed by a state, as the core of the criminality of crimes against peace, appears to lead nowhere. For if aggression by a state is nearly impossible to be agreed upon, individual criminal responsibility becomes an even remoter possibility. Moreover, the Nuremberg and Tokyo Judgments reveal that the commission of aggression by a state may not necessarily entail individual responsibility, but if there is any established, then it always presupposes aggression by a state. It is submitted that what matters is not defining aggression by a state in an all-sweeping and pre-existing formulation, but rather in determining in every particular circumstance of inter-state use of force whether aggression, in the sense of unlawful use of force, has been committed by a specific state.

[28] See International Law Commission, State Responsibility, Comments and Observations received from Governments, Doc. A/CN.4/488, 52 (Austria), 55–56 (France), 57–61 (Ireland), 62–63 (Switzerland), 63–64 (UK), 64–66 (USA). Comments and Observations by Governments in the Sixth Committee, 54th session-1999. Summary of Main Points, ed. by P. Bodeau, available on the website of the Lauterpacht Research Centre for International Law, <http://www.cam.ac.uk/rcil/ILCSR/Stateresp.htm>, 14–15.

[29] I. Brownlie, *System of Law of Nations. State Responsibility Part I* (1983) 32–33.

[30] J. Crawford & P. Bodeau, 'The ILC's Draft Articles on State Responsibility: Towards Completion of a Second Reading' (forthcoming in the December 2000 issue of *AJIL*), text available on the website of the Lauterpacht Research Centre for International Law, <http://www.cam.ac.uk/rcil/ILCSR/Stateresp.htm>.

[31] It has been suggested that resort to force by a state under the *bona fide* impression of the existence of a necessity of self-defence or by invoking a controversial justification, such as protection of nationals or humanitarian intervention, may give rise to state responsibility but not to individual criminal responsibility. See I. Brownlie, *International Law and the Use of Force by States* (1963) 213; Y. Dinstein, 'The Distinction between War Crimes and Crimes against Peace' in Y. Dinstein & M. Tabory (eds.), *War Crimes in International Law* (1996) 1, 8.

2.2 The Determination of Aggression

This author submits that there are two aspects of the issue. The *objective* determination, namely, what criteria are to be assessed, first as regards an instance of use of force by a state and, secondly, the precise involvement of an individual in making this use of force possible. There is, further, the question of the *subjective* determination concerning the body best placed to make the determination of aggression by a state and the involvement of an individual therein. The latter aspect of determining aggression concerns the role of the Security Council or a judicial body in determining the occurrence of aggression and an individual's involvement therein.

2.2.1 The Objective Determination of Aggression

The Nuremberg and Tokyo Judgments and state and judicial practice following the second world war seem to suggest three criteria, to be applied cumulatively, upon which a specific use of force by a state may be determined to constitute aggression: (i) the unlawfulness of a specific resort to force; (ii) the bad faith manifested by a state in resorting to armed force; (iii) the magnitude or the escalating effect of the force used by a state.

2.2.1.1 The Unlawfulness of Resort to Force

Basically, aggression is the unlawful use of force by states. Moreover, whether a particular use of force is in fact unlawful, depends on an evaluation of the justification offered by the state resorting to it. This evaluation constitutes a task undertaken on the basis of what international law lays the requirements to be for lawful resort to force, and this is largely a question of customary law. Since 1945 international law has offered a panoply of rules prohibiting unilateral resort to force by states and a universal collective security system providing for sanctions in case of breaches of the obligation not to resort to force unilaterally. The aim is to prevent a general breakdown of international peace and security based on the experience of the two world wars in the first half of the 20th century. The normative force of the law prohibiting armed violence constitutes the first and foremost barrier against aggression. What this body of law has achieved, however, is to limit drastically the situations of lawful resort to force and to compel states to invoke exceptions provided by the law to the rule prohibiting armed violence.[32] Whereas in the period of the League of Nations there was some uncertainty over the exact scope of the prohibition introduced by the League Covenant and the Pact of Paris, none of it exists, at least in principle, under the Charter and customary law. Indeed, the prohibition of the unilateral resort to force is universally accepted as a rule of *jus cogens.*[33] On the other hand, states have never abandoned, nor were they expected to, national interest and the temptation to pursue it, if their economic, military and political

[32] See *Nicaragua v USA Case (Merits),* ICJ Rep. 1986, 14, 98, para.186.
[33] *Ibid*., 97–101, paras 183–191.

power allow it, by way of armed force. Thus, the matter to be addressed is what exceptions are admitted to the rule prohibiting armed force between states.

The tendency in state practice after 1945 has been to expand the scope of the lawful resort to force, either by interpreting article 2(4) widely or admitting the concept of anticipatory self-defence or introducing new exceptions to the prohibitive rule, such as humanitarian intervention or armed action in furtherance of Security Council resolutions adopted under chapter VII of the UN Charter. The phrase 'against the territorial integrity and political independence of any State' in article 2(4) has been interpreted as meaning forcible acquisition of territory, leading to the claim that armed interventions for the protection of nationals abroad or on humanitarian grounds is lawful. The phrase 'inherent right of self-defence' in article 51 has been invoked as the basis for perpetuating the normative life of the *Caroline* formula and supporting the existence of a right of anticipatory self-defence or preemptive strike. Both lay emphasis on the general security considerations of the perpetrator of force and a general necessity to eliminate a perceived present or future threat to this security and not on the necessity to repel a real and happening use of force, that by its scale and effects casts a real threat to the existence of a state as a territorial and sovereign unit. Moreover, if one takes into account the highly dubious concept of anticipatory self-defence advanced by certain states, then it becomes obvious that the dividing line between lawful use of force and unlawful use of force is anything but clear.[34]

Be that as it may, the widening of the scope of lawfully permissible resort to force in principle limits drastically the possibility of unlawful resort to armed violence. Therefore, if there can be no aggression there can be no individual criminal responsibility. In 1981, at the time of the destruction of the Iraqi nuclear reactor (OSIRAK) by the Israeli air force there was universal condemnation of this act of force. Yet, in 1991, after Iraq had used force against Iran and Kuwait, it became known that the victim of the Israeli action just a decade earlier had been engaged in a programme of nuclear armament. The question is compelling: who was the real aggressor? It is submitted that the answer to this question involves a number of issues: first, is an instance of the use of force lawful or unlawful in the circumstances of a given situation? Secondly, is the specific use of force resorted to as a matter of national policy to achieve certain ends by way of armed force? Thirdly, can

[34] The concept of anticipatory self-defence deprives the presumption of the 'first' use of force as an indication of aggression in article 2, GA Res. 3314 (XXIX) of much of its significance. Furthermore, if the general pattern of the relations between two or more states is taken into account the determination of aggression becomes even more difficult. In cases like the Arab-Israeli relations, where tension has been endemic since the establishment of the state of Israel in 1948, it seems virtually impossible to determine the existence of aggression on either side. Was or was it not aggression the years-long refusal of the existence of the Jewish state, which was manifested in the attack against it in 1948 and the subsequent assistance to armed bands using force against it? Was or was it not aggression the resort to force by Israel in 1967 and the subsequent occupation of Arab territory? Was or was it not aggression the attempt by Egypt and Syria to recover it in 1973? How can we evaluate a continuous political and military threat to the existence of Israel as a state that has posed a general peril to its national security?

unilateral resort to force be justified if it is directed against a prospective aggressor? Fourthly, is there irrefutable evidence that the target of force is really a prospective aggressor? Fifthly, are mere indications of such contingency sufficient to justify lawful resort to force in self-defence? The Israeli action in 1981 was evaluated at the Security Council strictly upon the merits of the circumstances in which it took place and it was condemned.[35] But there was no evidence provided in 1981 of an allegedly general aggressive policy by Iraq, as this could be established in 1990–91. Moreover, what lay behind the decision to use force in 1981 appeared to be considerations of security of the state of Israel as such, arising from the hostile political environment towards it in the Middle East. That force was used in 1981 in circumstances not giving rise even to anticipatory self-defence, let alone self-defence against an armed attack, militated against the lawfulness of the Israeli action. On the other hand, the political foresight of the Israeli government concerning Iraq, correct though it may have been (Israel suffered a long range missile attack in 1991 that was conventional, not nuclear or chemical, in nature), did not justify the use of force in 1981. For the Israeli action subjected the rules on the use of force by states to an interpretation that corresponded to considerations of an individual state's own security policy. This is a dangerous contingency because it may result in weakening the prohibitive effect of the rules of the *jus ad bellum* and undermining the collective security system of the UN Charter. For if as 'lawful' resort to force is admitted this which serves the individual security interests of a state it is not meaningful of even talking about determining aggression.

It is submitted that what needs to be evaluated is whether any exception to the prohibition, including self-defence, is manipulated so as to serve as a pretext to further national policy by way of armed force. It is at this point that an individual's role acquires importance and may give rise to criminal responsibility. For if it is proved that a state resorted to force under an exception to the prohibition in violation of the requirements laid by the law, then it incurs responsibility to make reparation. But if it is proved that this resort to force was a deliberate option of the government of a state to further national policy, then individual responsibility for crimes against peace is a possibility. The claim that Germany acted against Norway in anticipatory self-defence in 1940 was rejected by the Nuremberg Tribunal. The Norwegian campaign was treated as a deliberate step at improving the general strategic position of Germany for the prosecution of her war effort.[36] Such proof, however, is extremely difficult to obtain. For it requires access to government decision-making, which is usually surrounded by top-secrecy. Moreover, as Nuremberg and Tokyo have revealed, such evidence is to be obtained after aggression has been resorted to and after the military defeat of the aggressor.[37]

[35] SC Res. 487 (1981) of 19 June 1981. See also, GA Res. 36/27 of 13 November 1981 (109:2:34) and individual Statements of governments at the SC SCOR 36th yr. 2280th mtg paras 31 (India), 39 (Brazil), 70 (Pakistan); 2286th mtg paras 15–16 (Guyana), 49 (Turkey); 2288th mtg paras 115 (Mexico), 141 (Uganda).

[36] (1947) 41 *AJIL* 172, 205–206.

[37] A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *EJIL* 144, 147.

Furthermore, it appears that it is necessary to examine in conjunction evidence of decision-making leading to resort to force by a state and its legality as a matter of the law in force concerning the use of force between states. This is the combination followed by the Nuremberg and Tokyo Tribunals. There was no reference to a pre-existing definition of aggression, but rather to the lawfulness or not of the actual use of force by Germany or Japan against a number of states, always in conjunction with decision-making or other form of government official participation.

The criticism by Defence Counsel at Nuremberg and the two dissenting opinions at Tokyo concerned not only the criminality of this decision-making and other participation but also the question of whether the Pact of Paris had deprived states of the right to resort to force. While the Judgments at Nuremberg and Tokyo seem to be problematic with respect to the former on the basis of a strict adherence to the principle of *nullum crimen*, this does not explain the insistence on a state's liberty to resort to force. For this general principle of criminal law could have been invoked only if states did not possess a general right to resort to force. In other words, it was rather the link between an individual's role and the question of a general right of use of force by his state that gave rise to objection. If the unlawfulness of a use of force by a state is the starting point, the real question is to what extent international law permits lawful resort to force. Then, it becomes explicable why there is such an insistence to achieve in advance a definition of state aggression as the core criminal element for crimes against peace. Individuals may avoid prosecution for such crimes more easily, if their state may use force unimpeded by international law, than by the *ante hoc* criminality of the individuals' acts leading to the state use of force. The unlawfulness of the use of force under international law makes individual responsibility equally readily admitted as a legal proposition, especially in view of its admissibility in domestic law.[38]

2.2.1.2 Bad Faith Manifested by a State that resorts to Armed Force

The rubric may refer to both a manipulative invocation of an exception to the rule of non-use of force and the general conduct of a state with respect to a particular situation or crisis. It is the latter contingency that will be discussed in this section. The manifestation of bad faith connotes a deliberate intent on the part of a government of a state not to accept the resolution of a dispute, which is promoted or effected either by a political organ of an international organization or by a judicial body or by individual states. Instead, this state appears to act either by ignoring the proposed or actual settlement of a particular dispute or extracting it, under a threat to resort to force, with a view of using it as a stage to advance further aggressive aims. In 1936 the Council of the League of Nations determined that Italy had committed aggression against Ethiopia, on the basis of Italy's invasion of that country in spite of an arbitral award settling the Wal Wal territorial dispute between them, which was favourable to Italian claims.[39] The Nuremberg tribunal treated the Munich

[38] I. Brownlie, *International Law and the Use of Force by States* (1963) 154–157.

[39] C. Antonopoulos, *The Unilateral Use of Force by States in International Law* (1997) 18, n.59.

Agreement of September 1938, by virtue of which part of Czechoslovak territory (the Sudetenland) was ceded to Germany, as a means of preserving international peace.[40] The occupation of Bohemia and Moravia in March 1939 was treated as a deliberate German exploitation of the mediating powers' good offices and breach of assurances not to use force against Czechoslovakia.[41] The unreliability of a government, which reneges on such assurances was stressed by the UK government with respect to the invasion of Kuwait by Iraq in August 1990 in conjunction with references to 'Iraqi aggression'. Thus, Mrs Margaret Thatcher, the UK Prime Minister, as she then was, stated at the Emergency Debate on the situation in the Gulf at the House of Commons on 6 August 1990 that '. . . despite having assured other Arab governments and leaders that he had no aggressive intent, Saddam Hussein ordered Iraqi forces to invade Kuwait in the early hours of 2 August . . .'[42] Moreover, at the Emergency Debate on the situation in the Gulf at the House of Lords, the Earl of Caithness, Minister of State, said that the invasion of Kuwait constituted a 'breach of faith' and showed that 'Saddam Hussein cannot be taken at his word'.[43]

In the above cases, the existence of bad faith has been determined objectively on the basis of the relevant states' practice following attempts to settle a dispute or to maintain international peace. Individual criminal responsibility in such cases, however, may not automatically be established in the absence of particular evidence as to the precise involvement of an individual official in the decision-making process or initiation or waging of the use of force by a state. This contingency also falls under the same difficulties with respect to access in such evidence.

2.2.1.3 The Magnitude or Escalation of the Use of Force

The Nuremberg and Tokyo tribunals dealt with individual criminal responsibility with respect to a conflict of tremendous intensity, geographical extent and destructiveness. It was also a conflict that escalated rapidly, partly as a result of the exercise of the right of collective self-defence, and partly as the result of strategic military planning by Germany and Japan. Both tribunals did not have to assess the magnitude and escalation of the conflict that became the second world war. That was a plain fact.[44] In the case of Germany, the invasion of Poland prompted the declarations of war by France and the UK. This led Germany to pursue its war effort against these states by securing strategic advantages against them. The result was a further escalation of the conflict by the invasions of Luxembourg, Belgium, the Netherlands, Denmark and Norway. The attack against the USSR necessitated the strategic option of subjugating the Balkans. Thus, from September 1939 until June 1941, the initial Polish-German conflict escalated into a European war.[45] In the Far

[40] (1947) 41 *AJIL* 172, 196.
[41] *Ibid*.
[42] UK Materials on International Law (1990) 61 *BYIL* 490.
[43] *Ibid.*
[44] I. Brownlie, *International Law and the Use of Force by States* (1963) 207–208.
[45] The Nuremberg Tribunal found that '. . . the aggressive war against Poland was but the beginning. The aggression of Nazi Germany quickly spread from country to country. . .' (1947) 41 *AJIL* 172, 203.

East, at the moment of the attack on the US in December 1941, Japan had been engaged in armed conflict against China since 1931. Immediately, after Pearl Harbour, Japan moved against the British and Dutch colonies in the Far East, as it seems, partly to forestall joint action against it and partly to advance its policy of 'Asia to the Asians'.[46] Following the declaration of war by Germany on the US the European and Far Eastern conflicts escalated into a world war.

The magnitude of the world conflict was established as a matter of fact, not by reference to a pre-existing definition of aggression. Indeed, such definition as it exists in General Assembly Resolution 3314 (XXIX) of 1974 makes no provision of particular intensity of the use of force. It just mentions a number of illustrations in article 3, that generally represent the modalities of resort to force by states. It then provides that a war of aggression is an international crime. It is submitted that the term 'war of aggression' must be interpreted in accordance with the Nuremberg and Tokyo precedents, namely, that it must constitute a use of force of considerable magnitude having the potential of escalation and constituting a break-down of international peace. It may not necessarily amount to a world conflict. It is submitted that a pertinent test in evaluating the intensity of a particular instance of resort to force is the one introduced by the Court in the *Nicaragua v USA (Merits)* case with respect to 'armed attack'. The Court ruled with respect to activities of armed bands by reference to article 3(g) of the Definition of Aggression that the use of force by guerrillas may be of the 'scale and effects' so as to constitute an armed attack.[47] The reference to General Assembly Resolution 3314 (XXIX) made by the Court indicates that an armed attack must be an unlawful use of force. Aggression is also an instance of unlawful use of force. Therefore, the particular incidence of an armed attack, a specific instance of use of force as opposed to an abstract concept of aggression, may amount to aggression for the purposes of individual criminal responsibility. Of the four cases where the Security Council determined that there existed a breach of peace, three (Korea, the Falklands and the Iraq-Kuwait crisis) involved major invasions followed (in the case of the Falklands and Kuwait) by seizure of territory. The fourth, the Iran-Iraq conflict involved the invasion of Iran by Iraq and a gradual escalation threatening to involve neighbouring states and some of the permanent members of the Security Council in the conflict. Article 39 of the Charter provides that the Council may make a separate determination of an act of aggression, in the sense of allocating responsibility on a state for the particular instance of the use of force considered by the Council.[48] It has also been suggested, that such a determination, refers to a war of aggression, as opposed to an isolated act of aggression.[49] It is submitted that as long as a breach of peace is of sufficient gravity as an instance of resort to force it merits constituting a basis for prosecution for crimes against peace. The fact that the Council refrained from a

[46] B. Rölling & A. Cassese, *The Tokyo Trial and Beyond* (1993) 42–46.
[47] ICJ Rep. 1986, 14, 103–104, para. 195.
[48] B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1995) 610.
[49] N.D. White, *Keeping the Peace. The UN and the maintenance of international peace and security* (2nd ed., 1997) 50.

determination of aggression so far, does not deprive a use of force that constitutes a breach of peace of its magnitude and gravity of effect.[50] Moreover, such use of force as shown by the four instances that a breach of peace was found to exist, possesses the characteristics of the instances dealt with by the Tokyo and Nuremberg tribunals. Furthermore, the absence of allocation of responsibility by the Security Council does not mean that such statements are not made by individual states. The universal condemnation of Iraq for the invasion of Kuwait is an illustration. It seems that what really matters, is the unlawfulness of the use of force and its magnitude, not by reference to an abstract concept of aggression, but to fact and legal evaluation on the basis of the current state of the law regarding the use of force by states. This is possible only if aggression is viewed as a generic term connoting unlawful use of force, and not as an abstract concept having a life of its own, which presupposes by defintion the unlawfulness of a use of force as if every controversy surrounding the use of force by states has been resolved. In this manner, the precedents of Nuremberg and Tokyo, the Judgment of the Court in the *Nicaragua* case and the determinations of breach of peace by the Security Council, may serve the possibility of prosecuting individuals for crimes against peace. Otherwise, they may simply be regarded as isolated cases of such prosecution or irrelevant to the concept of the crime of aggression. This is an issue that is of importance in relation to the party making a determination of aggression.

2.2.2 The Subjective Determination of Aggression

The question of which party is to make the determination of aggression by a state, upon which an individual's responsibility will be evaluated, became prominent in the course of the drafting of the ICC Statute. The Draft submitted by the ILC favoured the primacy of the Security Council in determining aggression.[51] This view appears to be supported by a number of states, including all five permanent members of the Council.[52] The argument is that the Charter of the UN has entrusted the

[50] *Ibid.*, 52.

[51] Report of the International Law Commission to the General Assembly on the work of its forty-sixth session, ILC Ybk 1994, Vol. II, Part Two, 43–45.

[52] C.K. Hall, 'The First Two Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1997) 91 *AJIL* 177, 181. It appears, however, that in the Fourth session of the Prep. Commission three of the five permanent members, Russia, China and the UK, favoured the deletion of article 23(3) of the Draft Statute proposed by the ILC: 'No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council, otherwise decides'. C.K. Hall, 'The Third and the Fourth Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124, 131. But, there seems to be no change of view with respect to article 23(2) of the ILC Draft: 'A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint'.

Council with this task under article 39. Therefore, any other involvement, apart perhaps from the competence of the General Assembly under the Uniting for Peace procedure, would warrant a usurpation of Council authority with respect to international peace and security. Thus, a determination by the Security Council is thought to be exclusive and presumed to be correct before the process of allocating individual responsibility is pursued.[53]

The opposite view, supported by a number of states, jurists and the judges of ICTY, is to give the ICC an equal and autonomous role.[54] Thus, it may be impossible for the ICC not to evaluate a charge of aggression for the simple reason that a defendant may claim to his defence that his state did not commit aggression.[55] Moreover, the exclusive authority of the Security Council to determine aggression would subject the ICC to the political climate existing in the Council. The fact, furthermore, that the Security Council has never made a determination of aggression under article 39 so far, would render unlikely any prosecution for crimes against peace. The present writer proposes to comment on these positions in turn and the solution considered by the ICC Prepcom.

2.2.2.1 Authority of the Security Council or the ICC to Determine Aggression

The assertion of the exclusive authority of the Security Council to determine the existence of aggression has important advantages and weaknesses. The creation of a collective security system in the aftermath of the second world war rests basically on the primary responsibility of the Council for the maintenance of international peace and security. Under this responsibility, the Council has the power to adopt binding decisions on behalf of the entire UN membership, by majority vote, in order to deal effectively with threats or breaches of international peace. The political force behind this arrangement was the unsatisfactory unanimity and discretion-based system of collective security of the League of Nations that made response to breaches of its Covenant in the inter-war period a near impossibility. The League members had no obligation to carry out the resolutions of its Council or Assembly. This institutional defect seems to have provided League members with enough room to remain indifferent to such breaches, if their national interest so required.

The binding force of Security Council decision-making has been an improvement introduced by the UN Charter over the Covenant, provided that a decision is taken. The process of decision-making in the Security Council accommodates

[53] J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140, 147; J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404, 411.

[54] V. Gowland-Debas, 'The Relationship between the Security Council and the Projected International Criminal Court' (1998) 3 *Journal of Armed Conflict Law* 97, 105 et seq.; C.K. Hall, 'The First Two Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1997) 91 *AJIL* 177, 181; C.K. Hall, 'The Third and the Fourth Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124, 131; Cassese, *loc. cit.*, 148.

[55] V. Gowland-Debbas, 'The Relationship Between the Security Council and the Projected International Criminal Court' (1998) 3 *Journal of Armed Conflict Law* 97, 107.

national interest in the voting procedure. The five permanent members of the Council, the great powers among the victors of the Axis, have a right of veto of draft resolutions. Their concurrent vote is a prerequisite for the adoption of a resolution on non-procedural matters – and the determination of aggression under chapter VII is such a matter. A *quasi* veto also exists on the part of non-permanent members of the Council, if nine of them vote against a draft resolution supported by all permanent members. Thus, UN members may not invoke national interest in order to refuse compliance with a resolution by the Security Council. However, national interest may certainly inspire, and has repeatedly inspired, the casting of votes in respect of a specific situation before the Council. This has been particularly true with respect to the five permanent members. During the period of the cold war the Council would often be deadlocked as a result of the veto, cast mainly by the former USSR and the US and seen as a means of superpower antagonism.[56] The authorization of military action against North Korea became possible because of the temporary Soviet abstention from the work of the Council, while in the period 1945–1990 the Council imposed non-military sanctions on only two occasions (South Rhodesia and South Africa). After 1990 the Council seems to have been substantially liberated from the cold war constraints, as manifested by an impressive frequency of adopting resolutions under chapter VII of the Charter and authorizing economic and military sanctions against a number of states. Still Council deliberation and decision-making is to a large extent inspired by political consideration, though there is a presumption that it would not act contrary to international law. The Council is in any event bound to act in accordance with the principles of the UN and general international law.

A determination of aggression by the Security Council as a necessary prerequisite for prosecution of an individual before the ICC could subject a substantial part of the element of the crime of aggression to the political climate of the Council. A decision to determine or not the existence of aggression is one that reflects the wide discretion of the Council on matters of international peace and security under article 39 of the Charter. In exercising this discretion the Council is unimpeded by a pre-existing definition of aggression. General Assembly Resolution 3314 (XXIX) states that it is intended to serve as a guideline to the Council, not as a legal basis upon which the Council can act. As long as the Charter of the UN provides a wide framework for the exercise of Council authority the Security Council has lawfully acted in never determining the existence of aggression so far. The reason for it appears to be that the maintenance of international peace, the primary goal of the Council, may be better served by not apportioning the blame for a use of force upon a specific state. Indeed, if the Council brands a recalcitrant state as aggressor this may lead to that state's intransigence and limit considerably the scope of effecting a reversal of the aggression. For aggression can be reversed, either by the aggressor state itself or by way of Council action, while this is not the case with respect to war crimes, crimes against humanity and genocide. The results of the latter are

[56] C. Antonopoulos, 'The Use of Force after the End of the Cold War' (1999) 4 *Journal of Armed Conflict Law* 117–120.

permanent and require punishment of the offender if justice is to be served. In the case of aggression, if it is reversed and reparation is awarded to the victim state, international peace and security is maintained and the role of the Council accomplished. There seems, therefore, to be a question of practical expediency. If priority is to be given to serving the maintenance of international peace and if this is to be effected by Council authority then it must be the Council itself that will judge whether an individual criminal prosecution must be pursued. If this is deemed to be a pertinent option in promoting the maintenance of international peace and security, then a broad acceptance of the existence of aggression must exist. The best guarantee for such acceptance is a resolution by the Council.

It is submitted that the question of which party is better placed to determine aggression for the purpose of prosecuting crimes against peace rests on a misleading basis. Such determination is to be arrived at by the Security Council not exclusively upon considerations of law, but in a manner not contrary to the law, always with the view of reversing a use of force and maintaining international peace. It is the latter contingency that is of cardinal importance to the Council. In determining whether there is or there is not an act of aggression the Council is under no specific obligation to adhere to a pre-existing definition of what is aggression in law. Moreover, the Council's determination pertains to action by a state and serves as the basis for the exercising of constraint, a basically executive authority. By contrast, the work of the ICC is to determine the role of an individual, which has led its state to commit aggression against another state. Therefore, it is absolutely essential to rule upon the legality of the use of force of the individual's state. This is a purely legal determination on the basis of the rules of international law on the use of force by states. Thus, the controversy over the party that is to make a determination of aggression seems to assimilate two totally different activities that aim at different purposes. While the prosecution of individuals for crimes against peace may have some significance for the maintenance of international peace and security, this is not its immediate goal. Rather, it is the punishment for particular acts that lead to a serious violation of the prohibition of the use of force by states. Whether the latter is condemned by the Security Council or is determined to be a breach of peace or aggression does not cause the role of individuals to disappear. Thus, it seems that, to assert an exclusive authority of the Council over the determination of aggression that serves a purpose different from that pursued by the ICC is to remove a question of law from the purview of the jurisdiction of a judicial organ. In other words, the whole debate appears to break down to whether the determination of aggression is a justiciable or non-justiciable matter, or rather, whether it should be a non-justiciable issue.

The Nuremberg tribunal[57] and the ICJ in the *Nicaragua (Preliminary Objections)* case[58] ruled that questions of the use of force by states are justiciable matters. In the case of the Nuremberg trial the issue was whether states were the sole judges of the circumstances that warranted resort to force in self-defence and

[57] (1947) 41 *AJIL* 172, 207.
[58] ICJ Rep. 1984, 393, 434–436, paras 94–98.

to this the tribunal replied in the negative. The ICJ adopted the same stance on the matter concerning questions of the use of force, namely, whether they would be better dealt with by the Security Council than the Court. However, in both cases the Nuremberg tribunal and the ICJ dealt with questions of unilateral use of force by states. It is a totally different matter to deal with a determination by the Security Council under article 39. That the Council's responsibility is primary and not exclusive is a question that has been addressed with respect to responsibility on the same matter exercised by the General Assembly.[59] Moreover, the question of the relationship between the Security Council and the ICJ has so far been this: the Security Council by virtue of article 36(3) of the Charter may recommend that legal disputes be referred by the parties to the ICJ. The ICJ itself has taken the view that its role is parallel and distinct in substance to that of the Council and that no conflict may be presumed to exist.[60] However, this does not account for the situation where the ICJ is likely to settle a dispute, which may require it to consider the legitimacy of Security Council action under chapter VII of the Charter. This is the issue that arose in the *Lockerbie* case and the answer to it, if ever, is to be given by the Court at the Merits stage of the dispute. Still, the delimitation of competence between the Security Council and the General Assembly, on the one hand, and the Security Council and the ICJ, on the other, is one concerning the UN system. The ICC is a Court outside this system and its Statute is not an integral part of the UN Charter. Thus, the provisions of the ICC Statute may not operate in so far as they conflict with the provisions of the Charter, in accordance with article 103 of the latter. Therefore, it is not surprising that article 5(2) of the ICC Statute provides that jurisdiction with respect to the crime of aggression is to be exercised in accordance with the Charter of the UN. Moreover, the work of the Prepcom in the aftermath of the Rome conference reveals a proposition that the ICC will defer to the UN collective security system[61] with respect to the determination of aggression, at least for a period of time.[62] After the lapse of this period the ICC could be seized of the matter.

Thus, the ICC is not totally precluded from determining the existence of aggression. Moreover, there is the proposition of concluding a co-operation agreement between the UN and the ICC, analogous to similar agreements between the organization and its specialized agencies.[63] The tendency is, therefore, to solve potential conflict of competence by way of co-operation but it does not settle the

[59] *Certain Expenses Advisory Opinion,* ICJ Rep. 1962, 151.

[60] *US Diplomatic and Consular Staff in Tehran,* ICJ Rep. 1980, 3, 20–21, para. 40; *Nicaragua Case (Preliminary Objections),* ICJ Rep. 1984, 393, 435, para. 95.

[61] Namely, that the Security Council acts under chapter VII and the General Assembly acts under the Uniting for Peace resolution.

[62] Preparatory Commission for the International Criminal Court, Proceedings of the Preparatory Commission at its fifth session (12–30 June 2000), PCNICC/2000/L.3/Rev. 1 http://www.un.org/law/icc 10–11, 12.

[63] See Draft Relationship Agreement Between the United Nations and the International Criminal Court, PCNICC/2000/WGICC-UN/L.1, 9 August 2000, http://www.un.org/law/icc/unprepcom .

core issue of crimes against peace: these crimes are pertinent to individual criminal responsibility, which is founded upon the occurrence of an unlawful act that gives rise to state responsibility. What will be the treatment of an individual's acts if the acts of his state are determined to be a threat to or a breach of peace? That this is very likely to happen is borne by the practice of the Security Council so far. State practice so far has tended to view aggression as a separate and autonomous concept connoting a special instance of resort to force. This concept has yet to receive a universally accepted definition that would exist in advance as a term of reference in law which both the ICC and the Security Council could resort to, in order to determine the existence of aggression in a manner free from contradiction. In the circumstances, the lack of such a definition might impair the credibility of the ICC in relation to prosecuting crimes against peace.[64] The inclusion of the crime of aggression in its Statute manifests a willingness of principle to have crimes against peace prosecuted. This remains a possibility only if aggression is treated as a descriptive term connoting the unlawfulness of the use of force in conjunction with its magnitude and a manifestation of bad faith in the conduct of the recalcitrant state. In this sense the ICC could exercise jurisdiction because all these factors in assessing aggression are justiciable. Moreover, the ICC is not intended to be a subsidiary organ of the Security Council, or in any other kind of hierarchical dependence to it. Even if it were, as the ICTY, it would still have according to the ICTY Appeals Chamber Decision on Jurisdiction in the *Tadic* case, the competence to decide the extent of its inherent jurisdiction.[65] Finally, in evaluating an instance of the use of force by a state, the ICC would not substitute the Security Council in its role. It would not make a determination in order to make the UN collective security system operative. It would only decide on a preliminary, but necessary issue, in order to allocate individual criminal responsibility. Thus, there does not seem to be a conflict envisaged in article 103 of the Charter between the ICC Statute and the UN Charter.

The provision in the ICC Statute that a definition of aggression must first be agreed upon until prosecution is made may subject the likelihood of the latter to near impossibility, given the unsuccessful attempts to define aggression in a manner acceptable to all. The expression of the willingness to prosecute crimes against peace and its realization by knowingly opting for a course that has been proved futile since the period of the League of Nations begs the question whether states really wish such prosecutions to take place. Thus it is pertinent to enquire whether there is a tendency in state practice to dispense with prosecuting crimes against peace.

[64] Cassese, *loc. cit.*, 147.

[65] *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995,* http://www.un.org/icty/…al/decision_e/51002.htm paras 10–22.

3 TENDENCY NOT TO PROSECUTE CRIMES AGAINST PEACE

This tendency may be explained by reference to: (1) the nature of crimes against peace as opposed to war crimes, crimes against humanity and genocide; (2) the reluctance to submit questions on the use of force to judicial scrutiny; (3) the difficulty of apprehending defendants; and (4) a perceived preference to address questions of unlawful use of force under claims based on state responsibility and the imposition of collective measures.

3.1 Nature of Crimes against Peace

War crimes, crimes against humanity and genocide consist of acts, which are easy to identify and establish their commission. Thus, the killing of prisoners of war, ethnic cleansing, a massacre of members of an ethnic group as elements of each of the above-mentioned crimes are immediately established upon commission. The perpetrators and victims are identifiable. In so far as intent is required, in the case of crimes against humanity and genocide, this may be discernible from the pattern of commission of the criminal acts. Moreover, these crimes consist of acts, which are by definition abhorrent by standards of morality and their core element (for instance, murder) is usually an offence punishable by domestic law. Finally, they constitute acts of which the results are irreversible. Thus, bringing the perpetrators to justice appears to be the only means of redress.

In the case of crimes against peace, on the other hand, what is immediately identifiable is the use of force by one state against another. The lawfulness of this use of force is a preliminary to be examined, and once it is established that resort to force has not been lawful, it is only then that the core element of crimes against peace is reached. This consists of the precise role an individual played in the use of force by his state and it requires evidence of decision-making and other participation that may be extremely difficult to find. The discovery of such evidence cannot be made in advance because of the secrecy which surrounds government planning, it may be destroyed and if any is ever to be retrieved this is usually possible after the total defeat of the aggressor state. The so-called Hossbach minutes of 1937 that constituted the primary evidence of the decision made by the government of Nazi Germany to pursue national policy by way of resort to force, were discovered after the capitulation of Germany in 1945.

Moreover, the effects of the use of force are reversible either by way of collective military action or by the aggressor state itself. It is true that an instance of resort to force may cause widespread outcry among other states or world public opinion. It is also true that it may give rise to revanchist claims on the part of the victim state. But the reversal of aggression is always a possibility and once it is achieved and international peace is restored there may be no desire to pursue the matter further and proceed with prosecution of the aggressor state's officials. If, for instance, the forcible occupation or annexation of the territory of the victim state is reversed and

reparation is forwarded, this signifies the failure of the use of force by the aggressor state which was decided, planned, initiated and waged by individual officials. Therefore, once the outcome of state action has been reversed there may be no need to punish the people that have made it a reality in the first place. Furthermore, the Nuremberg and Tokyo trials reveal that individual criminal prosecution for crimes against peace, in spite of the reversal of aggression, may be forthcoming in cases of governments that caused their states to resort to force on more than one occasion, in a manner that the initial use of force escalated into a major conflict. It may be thought that if they remain in power they are likely to do so in the future. The Iraqi regime may be considered to constitute such a government. However, the same government that initiated the conflict with Iran in 1980 and with Kuwait in 1990 remains in power and there seems to be no desire on the part of the international community to prosecute Iraqi officials for crimes against peace beyond the sanctions regime imposed by the Security Council on Iraq. By contrast there has been a proposal by the US to prosecute the Iraqi leadership for war crimes, crimes against humanity and genocide.[66]

3.2 Reluctance to Submit Issues of Armed Force to Judicial Scrutiny

The tendency to avoid judicial scrutiny of resort to force by a state is manifested on both the domestic and international plane. In the former case municipal courts appear to sanction it by refraining from pronouncing on the lawfulness of resort to force on grounds of trespassing upon constitutional prerogatives of the executive of the legislative branch of government. Thus, the US courts have declined to uphold claims that the war in Vietnam constituted a war of aggression or a genocidal war and did not condone the refusal of the individuals concerned to enlist in the US forces. In *US v Mitchell* the US Court of Appeals (2nd circuit) did not allow the appeal by distinguishing between the power of Congress to raise armies and navies, and their actual use on the field. Therefore, upholding the refusal to enlist would have impaired congressional power.[67] Consequently, a prerogative of a state's legislature prevailed at the expense of evaluating the resort to force of this state, by

[66] On 27 October 1999 Ambassador-At-Large for War Crimes Issues David J. Scheffer announced in a speech at the Carnegie Endowment for International Peace that the US Department of State had identified nine major criminal episodes under Saddam Hussein's rule. All of them involved war crimes, crimes against humanity and genocide, but not crimes against peace. Contemporary Practice of the United States Relating to International Law, ed. by S. Murphy (2000) 94 *AJIL* 102, 103. By contrast, the non-governmental group INDICT, to which Ambassador Scheffer referred and which has been lobbying for the prosecution of Saddam Hussein and other leading Iraqi officials for crimes under international law, includes crimes against peace in its list of violations of international law by the Iraqi regime. However, the charge of 'initiation of war in the region', namely, the invasions of Iran and Kuwait, are listed under the heading of 'War Crimes'. See INDICT, List of Regime's Violations of International Law, http://www.indict.org.

[67] 42 ILR 436.

way of raising an army which was put in action for achieving a specific goal. The US Supreme Court upheld the Court of Appeals judgment. In his dissent, Mr. Justice Douglas argued for the judicial review of Mitchell's enlistment '. . . because the case raised important issues concerning the International Military Tribunal at Nuremberg Charter that purports to lay down a standard of future conduct for all signatories . . .'[68] Moreover, in *US v Sisson*[69] the US District Court (Massachussetts) declined to uphold the claim that the Vietnam war was a genocidal war because to hold otherwise would be contrary to the US Constitution; it was difficult to ascertain the facts of a long conflict in progress and in the face of the executive's decline to disclose information; that the Court being a US court composed of judges from the allegedly offending state would be difficult to deliver a disinterested judgment; and, finally, that if *arguendo* the claim of genocidal war was true, then this would have given rise to the responsibility of the US as a state, but would not have established *locus standi* for an individual. The *Sisson* case is revealing in two respects. First, it is acknowledged that the executive branch of a government may be unwilling to subject its decision to resort to force and the conduct of the state army to the scrutiny of the state's domestic courts, let alone an international tribunal. Secondly, the judiciary of the state itself admits that its impartiality may be waived in evaluating such contingencies. The only instances of trials before municipal courts concerning individual responsibility for resort to force are those held before the domestic courts of some of the defeated Axis states immediately after the second world war. In these cases the cardinal ground for prosecution appears to have been initiating a conflict that exposed the state to military defeat.[70] On the international plane attempts to avoid the judicial scrutiny of use of force in some instances have been unsuccessful. Both the Nuremberg tribunal and the ICJ in the *Nicaragua (Preliminary Objections)* case took the view that matters concerning resort to force by states are subject to adjudication.

This reluctance may be seen to suggest that states are particularly concerned that in a trial of the officials of a state for crimes against peace allegations of *tu quoque* may be raised. The tolerance or encouragement of resort to force by the defendants' state on the part of the very state or states that initiated the prosecution may be embarrassing. Allegations of 'victor's justice' may also be made. Equally, instances of resort to force by the latter on other occasions may be the subject of criticism as exercises in hypocrisy. Indeed, Judge Pal's dissenting opinion to the Tokyo judgment is heavily premised on these lines. The knowledge of perpetrating war crimes, crimes against humanity and genocide followed by inaction at the time of their commission cannot give rise to claims of *tu quoque*, unless the same crimes have been committed by officials of the state initiating prosecution. In this case, the most that can be achieved is not acquittal of a defendant, but simply his not being sentenced for the acts he has been accused of. Thus, Admiral Donitz was found

[68] *Ibid*., 437.
[69] 42 ILR 439–440.
[70] I. Brownlie, *International Law and the Use of Force by* States (1963) 185.

guilty of unrestricted submarine warfare but he was not sentenced for it.[71] Moreover, the ICJ did not hold the US government responsible for atrocities committed by the contras during the civil conflict in Nicaragua in the 1980s, despite the fact that a Handbook of Operations issued by the US to the contra guerrillas encouraged the commission of violations of humanitarian law.[72] By contrast, the tolerance or even encouragement of the use of force by the aggressor state may give rise to at least political responsibility. Moreover, if it is followed by inaction in the context of international organizations, such as the UN Security Council, this may amount to political endorsement of the aggressor state's action.

This tendency may also suggest a continuing desire by states to be as much as possible the sole judges of resort to force, or at least to limit evaluation of their action only by political organs of international organizations. In the case of the five permanent members of the Security Council, for instance, this contingency is preserved, for they may cast a negative vote on any draft resolution that purports to castigate their own action or that of one of their allies. It is difficult to see how these states, that wish to reserve for themselves this privilege, can persuade others of a possibility to find their officials accused of crimes against peace. Thus, the exercise of jurisdiction by a permanent ICC with respect of crimes against peace has been met either with outright rejection or with attempts to vest determination of aggression exclusively to the Security Council.[73]

3.3 The Defendants

The ambiguities surrounding aggression do not seem to exist with respect to the identity of the persons liable for prosecution. They consist of a relatively small and easily identifiable group: high-ranking officials of the government, the armed forces and economic establishment of a state in a position to plan or influence or participate in the planning of aggression. Even then, not all of the above individuals may be held responsible for crimes against peace. What seems to be the crucial factor is the decision-making competence, real and influential, not ceremonial, of an

[71] (1947) 41 *AJIL* 172, 305. However, the Tribunal ruled that Admiral Donitz was guilty and was sentenced for waging aggressive war, because he directed submarine warfare in coordination with the other branches of the German armed forces. *Ibid*., 320–303.

[72] ICJ Rep. 1986, 14, at 64–65, 112–113, 129–130, paras 115–122, 216, 254–256.

[73] With respect to the position of the US see Ambassador Bill Richardson, US Permanent Representative to the United Nations, Statement at the UN Plenipotentiaries Conference on the Establishment of an International Criminal Court, Rome, Italy, 17 June 1998, http://www.un.int/usa/98–108.htm , tabs 1–2. David J. Scheffer, Ambassador-At-Large for War Crimes Issues, Head of the US Delegation at the Rome Conference, Testimony before the Senate Foreign Relations Committee, Washington DC, 23 July 1998, http://www.state.gov/ww. . .80723_scheffer_icc.html , tab 3; *ibid*. The United States and the International Criminal Court (1999) 93 *AJIL* 12, 14–15, 18–19, 21; R. Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *EJIL* 93, 104–105.

individual in the preparation of aggression.[74] The problem with possible defendants is whether they will be prosecuted at all and if they are, how they will be brought to the custody of a competent international tribunal.

The decision to prosecute or not is basically a political one. Thus, the Japanese Emperor Hirohito was not prosecuted at Tokyo in spite of knowledge of Japan's action that was executed in his name and although he played the decisive role in Japan's capitulation. Röling has suggested that this was due to, first, his constitutional position as a ceremonial head of state, in the sense that he did not actually take part in the decision-making leading to Japanese aggression. Secondly, it was an understanding on the part of Japan, apparently acquiesced to by the Allies, that it would surrender unconditionally if the Emperor was not prosecuted.[75] Similarly, not a single Italian government official or member of the armed forces was prosecuted on the international plane.[76] Italy defected from the Axis and capitulated separately in September 1943, while its aggression against Ethiopia (1935) and Albania (1939) had not been simply tolerated by the victors of the second world war, but was also invested, in the former case, with formal recognition. It would seem to be politically embarrassing to prosecute a state's officials for the crime of aggression the results of which the principal Allied powers had acquiesced to. Also, in the years after 1945, all of them, now permanent members of the Security Council, have resorted to force or lent their political support to their allies using force by casting their veto. Therefore, it seems that individual prosecution for crimes against peace might lead to these states being confronted with an embarassing *tu quoque.* As William O'Brien writes, the immediate result was that calls for the prosecution of Saddam Hussein for crimes against peace arising out of the invasion, occupation and annexation of Kuwait, were not pursued due to '. . . concern that a chain of events could be unleashed concerning possible individual criminal responsibility of Israeli and US high officials for crimes against peace and war crimes . . .'[77] Equally, the absence of crimes against peace from the ICTY Statute has removed the possibility of prosecution of Slobodan Milosevic, Radovan Karadzic, Ratko Mladic for the initiation of the conflicts in Croatia and Bosnia. It must not be forgotten that until the Kosovo crisis of 1998–99, Mr. Milosevic was considered an instrumental and influential diplomatic factor in achieving a peaceful

[74] See *In Re von Leeb et al. (German High Command Trial) US Military Tribunal at Nuremberg, Germany, 28 October 1948,* 15 Ann. Dig. 376, at 379 et seq.; *In Re Krupp et al., US Military Tribunal at Nuremberg, Germany, 30 June 1948,* 15 Ann. Dig. 620, at 621 n.2; *In Re Krauch et al. (I.G. Farben Trial) US Military Tribunal at Nuremberg, Germany, 29 July 1948,* 15 Ann. Dig. 668, at 669–670, 671 n.1; ILC Draft Code of Offences against the Peace and Security of Mankind (1996) art.16 (Commentary), http://www.un.org/law/ilc/reports/1996/chap02.htm, tabs. 26–27.

[75] B. Röling & A. Cassese, *The Tokyo Trial and Beyond* (1993) 39–42. But see: Separate Opinion of Sir William Flood Webb, President of the Tokyo Tribunal, 15 Ann. Dig. 356, at 373–374.

[76] But see I. Brownlie, *International Law and the Use of Force by States* (1963) 185 n.1.

[77] W. O'Brien, 'The Nuremberg Principle and the Gulf War' (1991) 31 *VaJIL* 400.

settlement in former Yugoslavia. Again, it would be highly embarrassing for the states seeking his support and co-operation, and engaging in political compromise with him, to subject him to trial for crimes against peace. While non-prosecution is deemed a legitimate option for general reasons of social reconciliation and return to political normality,[78] it does not seem to have served this purpose with regard to crimes against peace. The resulting impunity of state high officials has negated the preventive role of the crime. Thus, a state's leading elite may feel secure that prosecution for crimes against peace may not be forthcoming and this shall not dissuade them from planning and waging aggression.

Another issue concerning the defendants for crimes against peace is securing custody of the accused. These being the political, military and economic elite of a state, their apprehension, as state practice reveals, is possible if they are overthrown from power. This can be achieved either by external military force in the form of sanctions authorised by the Security Council or by internal political developments, usually involving violence. Again the case of Iraq constitutes a pertinent example. Security Council Resolution 678 (1990) authorized UN member states to take 'all necessary means' to expel Iraq from Kuwait and restore international peace and security in the area. It was phrased quite broadly so as to admit interpretation of authorizing action beyond the liberation of Kuwait, extending to the point of removing Saddam Hussein and his Baath regime from power. This was not, however, the interpretation given to this resolution by the coalition governments, in practice. Their action ceased once Kuwait had been liberated. At the same time, there were calls, especially by the US government, to the Iraqi Kurds and Shi'ite Muslims to rebel against the government of the state. This incitement of part of the population of Iraq to armed rebellion expressed a political will on the part of certain of the coalition states to see Saddam removed from power and at the same time an unwillingness to bear the military cost of achieving it. For as is shown by the manner in which operation *Desert Storm* (and later action in Kosovo) was carried out, there is great concern to minimize or dispense with human casualties lest the support of armed action by the domestic constituencies of the states that undertake military sanctions is lost. At the same time, authoritarian regimes, such as that in Iraq, have developed a powerful security services network and hold a firm grip on their armed forces that are in a position to react swiftly and crush any attempted internal uprising – and this was the case in Iraq in 1991. It appears, therefore, that states are no longer prepared to wage a major armed conflict against an aggressor similar to the war effort against Nazi Germany and Japan.

Another major handicap concerning securing custody of a defendant is his escape and finding sanctuary on the territory of a state prepared to grant it. In this case, it rests with the receiving government whether to surrender the accused or prosecute him itself. The recent prosecution for crimes against humanity of former Chadian president Hisene Hambre in Senegal, where he found sanctuary after his

[78] I. Brownlie, *The Rule of Law in International Affairs* (1998) 15–16.

overthrow from power, is an encouraging development.[79] However, general practice in this respect is inconsistent, for neither former Ugandan president Idi Amin, nor former Ethiopian president Mengistu or the late Zairean president Mobutu, were extradited or prosecuted by, respectively, Saudi Arabia, Zimbabwe and France, where they had fled after being removed from power. Moreover, even if a recalcitrant government loses power, it is not certain that individual members of it would be prosecuted by the new regime that takes its place. This is more likely to happen in cases of crimes against humanity, for either the old regime relinquishes power on the basis of political bargain securing amnesty for its members (namely the cases of General Pinochet in Chile and the Argentine junta) or there is a deliberate option for Truth and Conciliation Commissions for the sake of political normality and national reconciliation (namely the case of South Africa after 1994).

3.4 Prosecution of Crimes Against Peace as a Means to Restore International Peace

The Nuremberg tribunal ruled that '[W]ar is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[80] However, in the post-1945 era aggression may be dealt with not only by way of criminal prosecution of individuals, but also through the operation of collective security mechanisms, under chapter VII of the UN Charter and regional organizations.

State practice in the same period reveals a preference in favour of state responsibility and sanctions. It is submitted that this reality appears to disregard a great advantage of attributing individual responsibility for crimes against peace with respect to general international peace and security and a smooth transition to international normality and justice. By prosecuting and punishing individuals for crimes against peace the international community may dispense with the imposition of economic, political sanctions or the revival of military ones against a state. Although resort to armed aggression is a state's deed on the international plane, responsibility for it burdens a group of individuals and not the entirety of the state's population. Sanctions, however, mostly affect the latter rather than the ruling elite. When aggression is initiated the course preferred, especially after 1990, is to

[79] *Keesing's 2000,* 43345. The consideration by the House of Lords of the request made by the Spanish judiciary to have former Chilean President General Augusto Pinochet extradited to Spain from the UK in order to face trial for crimes against humanity contains equally encouraging statements of legal principle. However, General Pinochet was eventually not extradited and it is yet unknown whether he should be prosecuted before Chilean municipal courts.

[80] (1947) 41 *AJIL* 172, 186.

immediately impose sanctions on the recalcitrant state in order to reverse it. But once the decision is taken to do so, especially by military means, they must aim at restoring international peace and security meaningfully, by also removing the elite responsible for its breach. This may be true in cases where the government of a state has manifested a readiness to use force as a means of national policy on other occasions and gives rise to a presumption that it is likely to do so in the future if, after the reversal of aggression, it remains in power. This contingency is illustrated in the case of the government of Iraq. What we have witnessed in the Iraq-Kuwait crisis, is the reversal of the immediate result of the Iraqi use of force but the keeping in place of the government, responsible for attacking two neighbouring states in a decade. The continuation of general economic sanctions severely affecting an entire population unable to produce any credible political opposition after years of repression that eliminated opponents long before the attack against Iran. The imposition of Security Council Resolution 687 (1991), a *quasi* peace treaty, and the frustrating experience to enforce it, that has led two permanent members of the Security Council to resort to force unilaterally, undermining the UN collective security system in order to achieve it. The whole situation concerning Iraq has been unwholesome for there has not been a smooth transition to normal peace and security conditions. The credibility of the UN system is severely tested. The people of Iraq are suffering and the ruling elite asserts exoneration for its aggression against Kuwait by presenting UN action to its constituency, not as the application of collective security measures for its own violations of the law, but as a manipulated attempt by certain permanent members of the Security Council to destroy Iraq.

As sanctions remain the sole option states are prepared to accept in the face of armed aggression, the population of a state may be manipulated into accepting a policy of revenge, which may be materialized by further aggression. They are further manipulated into accepting a ruling elite as the saviours of the state entrusted with the task of reversing the injustice imposed by them. The Nazi leadership, which was prosecuted at Nuremberg, gathered a large constituency around it by promising to reverse the *Versailles diktat*. It took the immense catastrophe of the second world war to restore international peace in Europe, which was maintained and international normality restored by also removing them from power and punishing them. No severe peace terms were exacted from the German people as a whole, no collective responsibility was placed upon them. Regrettably, half a century later the Nuremberg legacy in this respect appears to have been forgotten. Instead, an authoritarian regime, that for the first time in the history of the UN invaded, occupied and annexed the entire territory of another state, bringing back memories of the unhappy 1930s, has remained in place by resisting the Security Council Resolution 687 (1991) *diktat*. The rest of the international community, having missed the opportunity in 1991 to do justice to the Nuremberg legacy, prefer either to wait for the state to collapse under sanctions, and the regime with it, or, at least some of its members, to risk undermining the UN collective security system by regularly bombing it.

CONCLUSION

The position with respect to crimes against peace in the aftermath of the Nuremberg and Tokyo trials may be summarized under the following points.

First, the lack of any prosecutions for instances of resort to force other than the second world war, manifests a reluctance to attribute individual criminal responsibility for such crimes but not an altogether abandonment of the concept.

Secondly, this reluctance appears to be due to the contingency that gives rise to individual criminal responsibility, namely, the occurrence of 'aggression'. The problem with the concept of aggression is that no definition of it is universally acceptable to states. This is something natural because it is impossible to achieve such a definition as a pre-existing statement of illegality of resort to force by states so long as the controversies surrounding it subsist in state practice. The extent of the rule of the prohibition of the use of force by states is disputed. So is the scope of the right of self-defence and the existence of other exceptions to the rule, such as the protection of nationals and humanitarian intervention. There is also a trend in state practice to expand further the exceptions to the prohibition of resort to armed force. Therefore, the more grounds of lawful resort to force are asserted the less is likely for 'aggression' to occur and thus individual criminal responsibility becomes a remote possibility. Moreover, the Security Council has never made a determination under article 39 of the UN Charter that an act of aggression has been committed. Furthermore, 'aggression' is an eventuality the results of which are reversible. As long as this can be achieved through collective security measures and international peace and security be restored, then it seems that there is no need of attributing criminal responsibility to individuals. Thus, it seems, there is a preference for prosecuting individuals for war crimes, crimes against humanity and genocide, the results of which are irreversible, as the only means of redressing the wrong done.

Thirdly, the quest for a universally accepted definition of aggression as a basis for prosecuting crimes against peace, seems to be inspired by the allegations of disregarding the general principle *nullum crimen sine lege* at Nuremberg and Tokyo. However, there is no need for a pre-existing definition of aggression for attributing individual criminal responsibility for crimes against peace. What matters is not an already-in-place definition of illegality of what is exclusively a state act. Rather, it is the inquiry into the unlawfulness of a particular use of force by reference to the rules of international law concerning the use of force by states. And this, in turn, requires further inquiry into the justification offered for a specific resort to force by a state. For, the *actus reus* of crimes against peace is not aggression, but the commission by an individual of certain acts that result in the resort to force by his state. Whether this resort to force is or is not lawful is a matter evaluated by the rules of *jus ad bellum* and is a prerequisite of attributing criminal responsibility, but it is not the essence of this responsibility. It is only if aggression is viewed as a generic concept of unlawfulness of a specific instance of resort to force that prosecution for crimes against peace may be realized. The Nuremberg and Tokyo precedents, the Security Council practice in determining the existence of a 'breach of peace' and the

ICJ Judgment in the *Nicaragua case (Merits)* point at the conditions to be met for a specific instance of the use of force to be 'aggression' for the purposes of crimes against peace. This, however, is not the position in contemporary practice. There is still a persistent quest to achieve a definition of aggression acceptable by all, as it is evident by the drafting of the Statute of the ICC and subsequent developments.

Fourthly, the lack of such a definition prolongs the inaction with regard to prosecution for crimes against peace. Moreover, it conceals a matter that is of particular concern to states, namely, their unwillingness to subject resort to armed force to judicial scrutiny. Furthermore, this concern has been articulated in the context of determination of 'aggression' with respect to the Statute of the ICC. The issue of whether it should be the Security Council or the ICC that determines 'aggression' tends to be resolved on the basis of a primary, not exclusive, responsibility of the former and in a manner of co-operation between the two bodies.

Finally, certain practical issues remain. The first concerns the acquisition of evidence about an individual's planning, preparation, initiating and waging of 'aggression', which is an extremely difficult task given the secrecy surrounding government decision-making. Moreover, obtaining custody of a defendant may require either his removal from power or the co-operation of other states. The experience with respect to the German and Japanese defendants reveals that this may be achieved by way of overwhelming force, whereas third state co-operation may not always be forthcoming.

The lack of prosecution for crimes against peace is unsatisfactory, but still it remains, even though remote, a possibility. While this fact does not give rise to optimism, it must not be forgotten that until recently war crimes, crimes against humanity and genocide had not been prosecuted on the international plane either. Their prosecution in the cases of former Yugoslavia, Rwanda and, possibly in the near future, Sierra Leone may constitute the least the international community can do to redress violations of international law that result in appalling atrocities. The prosecution of crimes against peace, if it happens, would serve a more meaningful and rapid transition to international peace and security. For punishment imposed upon the real perpetrators of resort to armed force by a state serves justice better than the prolonged attribution of collective responsibility upon the entire population of a state by way of sanctions.