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The crime against peace was at the centre of the creative precedence at Nuremberg and Tokyo. The Nuremberg tribunal famously qualified the waging of a war of aggression the supreme international crime. But this judgment, and the same is true for the Tokyo judgment, did not articulate an explicit definition of the concept of war of aggression, and no such definition was subsequently formulated by states. Quite to the contrary, the political will to do so was lacking during the Cold War.

In 1974, the General Assembly of the United Nations agreed on a definition of aggression but it was rather the concept of act of aggression as used in article 39 of the United Nations Charter which was defined and a distinction was drawn between this concept and the old traditional concept of war of aggression in this very definition. Article 5, paragraph 2, first sentence explicitly stated, a war of aggression is a crime against international peace, and that was the only reference to criminal law throughout this 1974 definition.

When it came to the renaissance of international criminal law, through the establishment of the international criminal tribunal for the former Yugoslavia and the international criminal tribunal for Rwanda, this renaissance happened without any reference to the crime against peace or the crime of aggression. The focus of international criminal law in its second generation which came into existence at that time, the focus was entirely on genocide, crimes against humanity and war crimes. No mention of the crime against peace, or the crime of Aggression in the Statutes for the two ad hoc tribunals.

In 1998, in Rome at the diplomatic conference, again it proved impossible for delegations to agree on a definition of the crime, still the legacy of Nuremberg and Tokyo was not entirely rejected at the Rome Conference in the late hours of this very conference a compromise was found. This compromise consisted in two elements, the crime of aggression as it was now called was included in the list of crimes under the jurisdiction of the Court, but at the same time it was stated that the exercise of the court's jurisdiction over that crime would be dependent on a future agreement about the definition of the crime and the conditions for the exercise of jurisdiction. All this was stated in article 5 of the ICC's Statute in its original form.

This was complemented by resolution (f) of the final act of the Rome Conference which mandated the Preparatory Commission to prepare proposal for a provision on aggres-

sion. But this Preparatory Commission achieved little progress on this subject. This is evident from the July 2002 coordinator's paper with all its auctions variants and brackets.

It was only the Special Working Group on the Crime of Aggression that paved the ground for the breakthrough on the definition of the crime. This Special Working Group first met in September 2003, and in 2009 it came up, to the surprise of many, with a clean draft definition. This achievement made it possible to place the crime of aggression on the agenda of the 2010 Kampala Review Conference of the Statute. And in Kampala, the draft definition as submitted by the Special Working Group was adopted as article 8bis together with article 25 paragraph 3bis of the Statute. This definition of the crime is complemented by elements of this crime and by understandings 6 and 7, the latter agreed in the late hours of the Kampala conference.

The definition of the crime of aggression as contained in article 8bis, contains three objective components: first, the state conduct element; second, the leadership requirement for possible individual perpetrators and participants; and third the individual conduct element. Let me turn to the first of those three elements, the state conduct element. And here, the crime of aggression stands out among the crimes under international law by requiring a certain conduct by a state. The participation of individuals in non-state conduct, for example in the conduct of the so-called Islamic State, can therefore not amount to a crime of aggression as defined in article 8bis, and this is in line with customary international criminal law.

According to article 8bis, paragraph 1, the state conduct in question must constitute an act of aggression which by its character, gravity and scale constitutes a manifest violation of the United Nations Charter. The state conduct must therefore, first, constitute an act of aggression. The first sentence of the second paragraph of article 8bis defines this concept in the same general terms which are used in article 1 of the Annex to GA Resolution 3314. The state conduct, therefore, requires, first, the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state or in any other manner inconsistent with the Charter of the United Nations. This means in other terms and in short, that the state conduct requirement implies, first, the need for a violation by a state of the prohibition of the use of force as contained in article 2, paragraph 4 of the United Nations Charter.

The second sentence of the second paragraph of article 8 bis contains a list of specific forms of use of force by a state. This list is taken from article 3 of the Annex to GA resolution 3314. There is some scholarly controversy as to whether this list is exhaustive or exemplary. The better view is the latter one. What counts is the existence of a violation of the prohibition of the use of force by a state. But a mere violation is not enough. The use of force by the state must constitute, by its character, gravity and scale, a manifest violation of the Charter of the United Nations. This so-called threshold is arguably the most important part of this entire definition. A significant number of delegations have voiced a preference for defining the state conduct element so broadly as to cover all or almost all violations of the prohibition of the use of force, but such a demand did not meet with a consensus because another part of the delegation supported a more narrow definition, and this for legal and for legal policy reasons. The main legal reason for a more narrow approach was to stay within the confines of pre-existing customary international law which had been the yardstick for the formulation of all other crimes included in the ICC Statute. The main policy reason was to confine the international legal criminality to the most serious violations of the underlying international rule of conduct. In the course of the negotiations, a fairly long list of technical avenues were explored on how best to achieve this goal. This list includes the traditional term war of aggression, the term armed attack as contained in article 51 of the United Nations Charter, or the requirement of the specific collective intent to annex or occupy territory. But a clear majority

of the delegation preferred using the term act of aggression, so it was decided to do so but to add the threshold requirement in question. This requirement has a double function, the words by its gravity and scale”, imply the need for a certain intensity of the illegal use of force. The words “by its character” set out a qualitative threshold. This comes in recognition of the fact that the prohibition of the use of force is surrounded by a grey area. In those cases which fall within this area, reasonable international lawyers differ in their views about the legality of the given use of force.

The qualitative dimension of the threshold requirement ensures that the grey area concerned remains outside the scope of application of the international criminalization. To illustrate the point by way of one example. Since the entry into force of article 2, paragraph 4 of the United Nations Charter, it is a matter of controversy whether the right of self-defense as recognized in article 51 of the United Nations Charter extends to anticipatory action in case of an imminent armed attack. And eminent authorities have submitted weighty legal arguments on both sides. The use of force by a state in necessary and proportionate anticipation of an imminent armed attack directed against it will therefore not qualify as a manifest violation of the Charter of the United Nations.

Let me now turn to the second objective component of the definition of the crime. There is a second reason why the definition of the crime of aggression stands out among the crimes under international law. Both the perpetrator of and a participant in the crime must be “A person in a position effectively to exercise control over or to direct the political or military action of a state”. This so-called leadership requirement is enshrined in article 8 bis, paragraph 1, and its repetition in article 25 paragraph 3 bis ensures that it applies also to participants. The leadership requirement, which goes back to Nuremberg and Tokyo, implies that the individual soldiers of an aggressor state which are placed below the highest military level will not be responsible for a crime of aggression. If those soldiers fight the war in accordance with the law of international armed conflict, they will thus not face the possibility of prosecutions.

The individual conduct element, to finally turn to the third objective component, is again contained in article 8 bis, paragraph 1 and it closely mirrors the language used at Nuremberg and Tokyo. The element covers the planning, preparation, initiation or execution of the act of aggression. The planning and the preparation may occur at a fairly early moment in time. It is therefore important to note that a crime of aggression requires that the act of aggression by the state, the state conduct element, is in fact committed. Perhaps this is set out more clearly in the third element of the crime than in the definition of the crime in article 8 bis itself. During the negotiations, it was discussed whether a so called monistic approach to the application of the individual conduct element should be applied. Such an approach would have meant not to apply the different forms of participation contained in article 25, paragraph 3 of the Statute. Instead, the individual conduct would have been simply any participation by a leader in the state act of aggression. In the end, however, the so called differentiated approach prevailed, and this means that article 25, paragraph 3 does apply to the crime of aggression so that there may be leaders who perpetrate the crime and others who participate therein.

Article 30 of the Statute on mental elements is applicable to the crime of aggression. With respect to the state conduct element, elements 4 and 6 of the elements of the crime state that the perpetrator must only know the factual circumstances that established that the use of force amounted to a manifest violation of the UN Charter.

In late June 2017, which is the time of this recording, more than 30 states have ratified the Kampala Amendments on the crime of Aggression. Yet, one more hurdle must be passed before the Court may exercise its jurisdiction over the crime. That is, the States Parties to the

Statute must take a decision to activate the Court's jurisdiction. This decision could be made at the occasion of the upcoming meeting of the Assembly of States Parties in December 2017. Please do listen to my introduction to Article 15 bis of the Statute for some more information.