

## AGGRESSION AS “ORGANIZED HYPOCRISY?” – HOW THE WAR ON TERRORISM AND HYBRID THREATS CHALLENGE THE NUREMBERG LEGACY

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*Modern threats to international peace and security from so called “Hybrid Threats”, multimodal threats such as cyber war, low intensity asymmetric conflict scenarios, global terrorism etc. which involve a diverse and broad community of affected stakeholders involving both regional and international organisations/structures, also pose further questions for the existing legacy of Nuremberg. The (perhaps unsettling) question arises of whether our present concept of “war and peace”, with its legal pillars of the United Nations Charter’s Articles 2(4), 51, and the notion of the criminality of waging aggressive war based on the “legacy” of Nuremberg has now become outdated to respond to new threats arising in the 21st century. This article also serves to warn that one should not use the definition of aggression, adopted at the ICC Review Conference in Kampala in 2010, to repeat the most fundamental flaw of Nuremberg: ex post facto criminalisation of the (unlawful) use of force. A proper understanding of the “legacy of Nuremberg” and a cautious reading of the text of the ICC definition of aggression provide some markers for purposes of the debate on the impact of new threats to peace and security and the use of force in international law and politics.*

*Les menaces modernes à la paix et à la sécurité internationales, par exemple les menaces dites « hybrides », les menaces multimodales comme la cyberguerre, les conflits asymétriques de faible intensité et le terrorisme mondial, qui impliquent un groupe vaste et diversifié d’intervenants provenant de structures et d’organismes régionaux ou internationaux, remettent en cause l’héritage du procès de Nuremberg. Se pose également la*

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*question (peut-être troublante) de savoir si la notion actuelle de « guerre et paix » ancrée juridiquement dans le paragraphe 2(4) et l'article 51 de la Charte des Nations Unies et la criminalisation de la guerre d'agression fondée sur l'« héritage » du procès de Nuremberg demeure encore pertinente en ce qui concerne la réponse aux menaces du 21<sup>e</sup> siècle. Le présent article sert également à prévenir qu'il ne faut pas utiliser la définition du terme « crime d'agression » adoptée à la Conférence de révision du Statut de Rome (ayant instauré la Cour pénale internationale (CPI)), qui a eu lieu à Kampala en 2010, pour reproduire la lacune la plus fondamentale du procès de Nuremberg : la criminalisation a posteriori du recours (illégal) à la force. Une compréhension adéquate de l'héritage du procès de Nuremberg et une lecture prudente de la définition du terme « crime d'agression » de la CPI fournissent des balises au débat sur l'incidence des nouvelles menaces à la paix et à la sécurité, ainsi qu'à l'utilisation de la force en politique et en droit internationaux.*

## I. INTRODUCTION & OVERVIEW

The unfolding events of the “Jasmine Revolution” in North Africa during the so called “Arab Spring”<sup>1</sup> of 2011 challenged and even changed the political landscape in the Maghreb, the Arab and the Mid-Eastern world. While some of the protests led, with the deposition of Zine al-Abidine Ben Ali in Tunisia and Hosni Mubarak in Egypt, to actual regime change and a move towards freedom and democracy, other states in the regions have been less fortunate and saw a backlash of the “old order” of autocratic governments as witnessed in the cases of Bahrain and Syria. In late October 2011, the conflict in Libya had come to an end with its leader (*de facto* president) Muammar al-Gaddafi (who officially held no public office in Libyan Jamahiriya) killed and a new transitional government, the National Transitional Council [NTC], in power. This was the outcome of a seven month conflict with sixth months of intensive close air support by NATO air power, enforcing United Nations Security Council Resolution 1973 (2011)<sup>2</sup>: the future will tell how successful in terms of democratisation and self-determination the *de facto* “regime change” in Libya will turn out to be. The prolonged and costly military engagement in Libya highlighted how quickly NATO and the European Union could be drawn into military combat operations, unofficially referred to as “kinetic operations”, when asked or compelled to contribute militarily to peace and security stabilization operations in the region in order to stop the commission of widespread human rights violations (as evidenced in Libya).

This foreign, mostly western, military response to a developing “humanitarian crisis” on the ground constitutes one of the most recent examples of the use of military force in the wider context of war – albeit authorized by the United

<sup>1</sup> Aptly reiterating the hopes associated with the Prague spring of 1968 which after an initial period of hope for democratic change led to the military crushing by Soviet led invasion forces.

<sup>2</sup> UN S/RES/1973 (2011), which was adopted after the Arab League asked the United Nations in a resolution of 12 March 2011 to establish and enforce such a “no fly zone” in Libya to protect Libyan civilians in the Libyan Arab Jamahiriya.

Nations Security Council under Chapter VII United Nations *Charter* – involving NATO assets in this century. At the beginning of the previous decade, it was “9/11” (as the attacks on 11 September 2001<sup>3</sup> on the United States of America were called), which led to the present so-called “war on terror”, which so far has seen two military campaigns<sup>4</sup> of doubtful legality<sup>5</sup> under international law: “Operation Enduring Freedom” in 2001<sup>6</sup> was followed by “Operation Iraqi Freedom” in 2003.<sup>7</sup> The legality of both campaigns, including the invasion and subsequent “regime-change” in the case of Iraq by the US-led coalition, will be subjected to legal debate for years to come.<sup>8</sup> Despite this, and on-going inquiries (such as the UK Iraq inquiry)<sup>9</sup>, it seems rather unlikely that there will be any (international) criminal law action for the crime of aggression taken against any individual leader for having planned and/or ordered the invasion of Iraq. This omission has to be seen against the backdrop of the Nuremberg trials of 1945 and their continuing legacy as enshrined in the Nuremberg Principles of 1950. While this legacy informed various domestic and international prosecutions of crimes under international law such as war crimes, crimes against humanity and genocide, the crime of aggression basically became a very contentious debating point, but with no prosecutions for this crime during the decades following the trials at Nuremberg and Tokyo. The (legal) dynamics changed somewhat with the adoption of the Resolution on Aggression at the Kampala Review Conference of the *Rome Statute* of the International Criminal Court in 2010.

This article asks the question whether “9/11” and the subsequent “war on terror” has changed our perception of the overall legacy of the Nuremberg trials in

<sup>3</sup> Referring to the infamous attacks on the World Trade Center and the Pentagon, executed by mostly Saudi-born terrorists of the Al-Qaeda network, which took place on 11-09-2001, in which some 3000 people lost their lives. C.f. Dominic McGoldrick, *From “9-11” to the Iraq War 2003: International Law in an age of complexity* (Oxford: Hart Publishing, 2004) 9-11; also referred to as 9/11 attacks.

<sup>4</sup> The US led military campaign in Afghanistan since autumn 2001 was named “Operation Enduring Freedom” [OEF] and targets remaining Taliban and Al-Qaeda structures; as well OEF operates the UN mandated international assistance mission of the International Security and Assistance Force [ISAF], see Security Council Resolution 1386. The second on-going military operation takes place in Iraq and is called “Operation Iraqi Freedom” [OIF].

<sup>5</sup> For critical comments, see Johan D van der Vyver “us contra bellum and American foreign policy” (2003) 28 SAYB Int’l L 1; Jutta Brunnée & Stephen J Toope “Slouching towards new ‘just’ wars: international law and the use of force after September 11<sup>th</sup>” (2004) 51 Nethl Int’l L Rev 363.

<sup>6</sup> See Don Kritsiotis, *On the jus ad bellum and jus in bello of Operation Enduring Freedom: Proceedings of the American Society of International Law, 2002* (Washington, DC: The American Society of International Law, 2002) 35.

<sup>7</sup> For a commentary and legal analyses of the Iraq War, see American Society of International Law, *Future Implications of the Iraq Conflict* (Washington, DC: The American Society of International Law, 2004); McGoldrick, *supra* note 3 at 47-51 for a comprehensive discussion of the legal debate on the Iraq War and Sascha-Dominik Bachmann & Gerhard Kemp, “The international crime of aggression in the context of the global “war on terror”: some legal and ethical perspectives” (2010) 2 Journal of South African Law 309

<sup>8</sup> Which was neither explicitly authorised by the UN Security Council, nor an apparent act of self-defence under Article 51 of the UN *Charter*. For comments on the legality of the 2003 invasion of Iraq, see Lori Fisler Damrosch & Bernard H Oxman eds, “Agora: Future Implications of the Iraq Conflict” (2003) 97:3 AJIL 553; McGoldrick, *supra* note 3.

<sup>9</sup> The Iraq Inquiry was officially launched on 30 July 2009 and continues up to this day, see online: The Iraq Inquiry <<http://www.iraqinquiry.org.uk/>>.

respect to the crime against peace as enshrined in Article 6 (a) of the *Nuremberg Charter*, which has become a substantial part of the crime of aggression under the *Rome Statute* of the International Criminal Court (now provided for in Article 8bis adopted at the Kampala Review Conference and which will enter into force at the earliest in 2017). New, modern threats to global peace and security stemming from so called “Hybrid Threats”,<sup>10</sup> such as cyber war, low intensity asymmetric conflict scenarios, global terrorism, organized crime and piracy affect and involve a diverse and broad community of stakeholders at both the regional and international level and also pose further questions for the legacy of Nuremberg. The (perhaps unsettling) question arises of whether our present concept of “war and peace” with its legal pillars of the United Nations *Charter’s* Articles 2(4), 51, and an underdeveloped notion of the criminality of waging aggressive war, based on the “legacy” of Nuremberg, has not become outdated to respond to new threats arising in the 21<sup>st</sup> century. Our question is furthermore based on the assumption that new powerful (non-Western) role-players will have their own imprint on the development of what might become the 21<sup>st</sup> century *jus contra bellum*: a sceptical view of the use of armed force to further universalist or liberal goals and ideas such as “humanitarian intervention” (or more bluntly, regime change posing as human rights intervention), or indeed expansive notions of self-defence under the rubric of the “war on terror”. The idea here is germinal indeed, but a necessary preliminary in order to proceed with the basic criticism of the Nuremberg legacy as essentially inadequate in terms of the new threats to peace and security.

This article<sup>11</sup> consists of three parts: firstly, it summarizes briefly the major arguments and criticism which were originally directed at the legality of the crime against peace under Article 6 of the *Nuremberg Charter* and the subsequent principles VI and VII of the Nuremberg Principles<sup>12</sup> as the legal precursors to the crime of aggression under the *Rome Statute*. It is not the intention of the authors to question at length the legality or even morality of the Nuremberg trials as such but to discuss the legacy of the Nuremberg trials and their impact on the development of the (new) law of aggression post World War II. Secondly, a summary of the

<sup>10</sup> NATO describes these Hybrid Threats as those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives – NATO has identified these threats and established a concept framework, the so called Military Contribution to Countering Hybrid Threats [MCCHT] which aims at identifying a wider comprehensive multi-stakeholder response, see BI-SC Input for a New NATO Capstone Concept for The Military Contribution to Countering Hybrid Enclosure 1 to 1500/CPP-CAM/FCR/10270038 and 5000 FXX/0100/TT-0651/SER: NU0040, dated 25 August 2010). For general information on the NATO CHT experiments see online: NATO <<http://www.act.nato.int/top-headlines/nato-countering-the-hybrid-threat>>. The author took part in this experiment in 2011 as NATO Rule of Law subject matter expert [SME].

<sup>11</sup> The authors have undertaken some prior work in that field. For a general background see, Bachmann & Kemp *supra* note 7. Sascha Dominik Bachmann, “Today’s quest for international criminal justice - a short overview of the present state of criminal prosecution of international crimes” in Noëlle Quénivet & Shilan Shah-Davis, eds, *International Law and Armed Conflict: Challenges in the 21st Century* (Netherlands: TMC Asser Instituut, 2010) and Gerhard Kemp “Constitutionalization and the International Criminal Court: Whither individual criminal liability for aggression?” (2008) 4 SALJ 694.

<sup>12</sup> To cite Franz B Schick, an early rapporteur and writer on the Nuremberg trials: “not to imply [...] that the moral war guilt of Germany’s political leaders has not been established beyond any doubt whatsoever [...] but to demonstrate [...] legal difficulties...” in “Crimes Against Peace” (1948) J Crim L & Criminology 445 at 449.

present state of the codification of the crime of aggression under the *Rome Statute* of the International Criminal Court after the 2010 Kampala conference reflects on the legacy of Nuremberg from a contemporary and critical perspective. Thirdly, this article concludes with a brief outlook on new dimensions of possible future threats to peace and security as challenges to our present concept of war and peace and reflects on possible responses.

## II. THE CRIME AGAINST PEACE AND THE LAW OF NUREMBERG: LEGALITY AND CRITICISM

The four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law.<sup>13</sup>

### A. Introduction

World War II cost approximately 55 million human lives, mostly civilian non-combatants as victims of direct targeted annihilation and of as what is today referred to in the technical language of armed conflict as “collateral damage”, and saw the commission of widespread human rights atrocities by all sides. It was, however, Nazi Germany’s aggressive wars waged in Europe, the commission of mass human rights violations such as the murder in concentration and extermination camps, the Holocaust, and war crimes which led to the establishment of the International<sup>14</sup> Military Tribunal [IMT] of Nuremberg in 1946 as a manifestation of a unified allied approach to international post war justice. The United States of America, Great Britain, the Soviet Union and France as the four victor powers of World War II, who, reflecting on the failed Leipzig trials two decades before, opted against any German involvement in the prosecution of the major war criminals.<sup>15</sup> Consequently, an allied tribunal<sup>16</sup> was established, following the joint declaration<sup>17</sup> of the “London Agreement of 8 August 1945 for

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<sup>13</sup> See Joe J Heydecker & Johannes Leeb. *The Nuremberg Trial: A History of Nazi Germany as Revealed through the Testimony at Nuremberg*, translated by RA Downie. (Westport, Connecticut: Greenwood Press, 1958) at 534.

<sup>14</sup> Judges and prosecution consisted of allied personnel alone. The fact that no member of a “neutral” state was allowed to participate in the trials already questions the nature of the international military tribunal as being “international”.

<sup>15</sup> See *LawReport of Trials of War Criminals*, Selected and prepared by the United Nations War Crimes Commission 1947-1949 at Volume IX referring to the fact that the Leipzig court cases had shown that the prosecution of war criminals before their own domestic courts did not achieve the desired effect of establishing the factual context of the committed crimes and deterrence. On the other hand the example of German Nazi trials post-1949 show that a successful prosecution could have taken place based on German law which was in existence at the time the crimes were committed, see Sascha-Dominik Bachmann, “The legacy of the Nuremberg Trials – 60 years on” (2007) 3 *Journal of South African Law* at 545.

<sup>16</sup> The Tokyo tribunal was established in 1946 and had jurisdiction over crimes committed by the Japanese in the Far East. Its jurisdiction, procedure and powers followed the *Nuremberg Charter*. It sentenced twenty-five Japanese war criminals out of the original twenty-eight accused. See Steven R Ratner & Jason S Abrams *Accountability For Human Rights Atrocities In International Law-Beyond the Nuremberg Legacy* (New York: Oxford University Press, 2001) at 189.

<sup>17</sup> The Allied Powers had already declared in their Moscow declaration of 30 October 1943 “Concerning Responsibility of Hitlerites for Committed Atrocities” their intent to try all German

the Prosecution and Punishment of Major War Criminals of the European Axis”<sup>18</sup> which called for the “just and prompt” trial and punishment of the major war criminals of Germany.<sup>19</sup> The United States’ determination to grant the defendants a fair trial had eventually overcome initial, more “revanchist” approaches to justice<sup>20</sup>, such as Stalin’s suggestion to execute summarily 50,000 German military staff as war criminals as a means of criminal justice.<sup>21</sup> This post-World War II criminal *ad hoc* tribunal (together with its military-judicial counterpart in Tokyo) established a new notion of individual accountability for the individual perpetrators of crimes under international law. But even 65 years later, questions still remain about the legality and legacy of these trials:<sup>22</sup> whether the law of Nuremberg<sup>23</sup> resembled “new” retroactive law which may have been contrary to the legality principle evident in international law at that time.

### B. The legality of the IMT and the criticism of retroactive law

Some criticism of the IMT centered around the possible nature of the Nuremberg trials as so called “victors’ justice” and as the “prosecution of World War II’s losing parties by the victors”<sup>24</sup> as resembling a legal “framework... established to exclude the crimes of the Allied Powers”.<sup>25</sup> One of the main criticisms of the *Nuremberg Charter* and of the later judgments of the IMT was

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war criminals, text available from Yale University’s Avalon Project online: Yale Law School <<http://avalon.law.yale.edu/w-wii/moscow.asp>>.

<sup>18</sup> *The (London) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal* 82 UNTS 280, (entered into force 8 Aug 1945) [*London Agreement*].

<sup>19</sup> *Ibid*, art 1.

<sup>20</sup> See art 1, 16 of the *Nuremberg Charter*. It was mostly the United States that urged the other three powers to follow this principle (and that the understanding of justice somehow differed among the powers: e.g. did the British favour the idea of executing all German leaders without a formal trial? See Justin Hogan-Doran & Bibi T van Ginkel “Aggression as a Crime Under International Law and the Prosecution of Individuals by the Proposed International Criminal Court” (1996) 43:3 *Nethl Int’l L Rev* 331 ff. Stalin favoured this procedure as well but suggested a *pro forma* trial in the tradition of the Soviet purgation trials of the thirties. See Johan Steyn “Guantanamo Bay: The Legal Black Hole” (2004) 9 *ICLQ* at 33.

<sup>21</sup> Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (London: MacMillan Press Ltd, 1999) at 31 and Heydecker & Leeb, *supra* note 13 at 78.

<sup>22</sup> Referring to the original IMT, plus the subsequent trials under CCL No 10.

<sup>23</sup> Consisting of the *London Agreement*, *supra* note 18, the *Nuremberg Charter* and its subsequent *Control Council Law No. 10* of Dec 1945.

<sup>24</sup> See e.g. Neli J Kritz “Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights” (1996) 59 *Law and Contemp Probs* 130; Beigbeder, *supra* note 21 at 39.

<sup>25</sup> See KC Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford, CA: Stanford University Press, 2008) at 37. Noam Chomsky, *Hegemony or Survival-America’s Quest For Global Dominance* (New York: Macmillan, 2003), 21ff characterizes the international military tribunal trials as trials which were following the principle that “victors do not investigate their own crimes” and as such excluded the allied bombing of the German civilian population for example. Another example of such one-sided victors’ justice was the infamous example of the execution of up to 15,000 Polish prisoners of war by the Soviets in 1940, during the so called Katyn massacre. The Soviets tried unsuccessfully to hold Germany accountable for this crime and included it in the indictment of Göring and others. See Winston Churchill, *The Second World War-Volume IV-The Hinge of Fate* (London: Cassell, 1951) at 681 and Quincy Wright “The law of the Nuremberg trial” (1947) 41:1 *AJIL* at 38, 44 for an early account of this criticism.

based on the assumption that the law of Nuremberg possibly violated the legality principle and non-retroactivity doctrine in criminal law often described in terms of the maxims *nullum crimen sine lege* and *nulla poena sine lege*.<sup>26</sup> Other causes of criticism were related issues such as the "*ex post facto*" nature of the *Nuremberg Charter's* codification, the use of legal analogies and the existence of legal ambiguities (which will not be discussed in this article). Nuremberg was the product of a political-legal approach, taken by the Allied victors in World War II to end criminal impunity of waging aggressive war based on the sobering observation that there was "no general prohibition in international law against the waging of war."<sup>27</sup> Reisman (with reference to the post-war responses) describes the interdependence of the illegality of using aggressive war and the need for criminal sanctions of such actions:

The first was a political response to aggression: the United Nations Charter prohibited "the threat or use of force against the territorial integrity or political independence of any state" and authorized the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." The second was a criminal justice response to aggression: the victors established international tribunals for finding "individual responsibility" for "planning, preparation, initiation or waging of a war of aggression."<sup>28</sup>

The law of Nuremberg constituted law which had been imposed on the defeated enemy state of Germany. Consequently, the question had to be asked whether the four victor powers had the necessary legitimacy to enact the *Nuremberg Charter* as new law. The following arguments sum up the view that the creation of the *Nuremberg Charter* did not violate international law, or was, at least, justifiable:

1. The assumption of the unlimited legislative, judicial and administrative jurisdiction over the German territory and its people by the allied control council after the factual "*debellatio*" of Germany through the four victorious powers, made the absence of an international treaty with Germany under the prevailing circumstances, acceptable to the international community.<sup>29</sup>

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<sup>26</sup> These principles state as requirements for any criminal prosecution that the crimes in question were qualified as a crime or criminal act by an existing law at the time of their commission, see Claus Kress "Nulla poena nullum crimen sine lege", online: Max Planck Encyclopedia of Public International Law 4, 5 online: Max Planck Encyclopedia <<http://www.mpopil.com>> for an account of the post WW II critique.

<sup>27</sup> W Michael Reisman "Introduction: The Definition of Aggression and the ICC" (2002) 96 *ASIL Proceedings* at 181.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Hans Kelsen "The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals" (1945) 2 *The Judge Advocate Journal* at 11.

2. The IMT had jurisdiction *ratione personae* over individuals only and not over Germany as a state. The subjecting of individuals to a foreign jurisdiction did not require the consent of Germany as the state of origin of these individuals.<sup>30</sup>

Contemporary practice of establishing international criminal tribunals to prosecute individual perpetrators of international crimes resembles not only a lawful means for the United Nations Security Council's powers to respond directly to a threat to the peace as stipulated in Chapter VII of the *Charter* of the United Nations<sup>31</sup> but even a duty in terms of the duty to protect civilians<sup>32</sup> from the commission of the core crimes.<sup>33</sup> This practice follows directly the Nuremberg precedent of creating a tribunal to adjudicate crimes under international law. Such actions are freed from the necessity to obtain prior consent of the states affected.<sup>34</sup> The jurisdiction of these *ad hoc* international tribunals derives directly from Security Council resolutions and/or multilateral treaties.

The establishment of the international criminal tribunals for Yugoslavia and Rwanda were such United Nations Chapter VII actions of the Security Council. The Special Court for Sierra Leone was established as the result of genuine cooperation<sup>35</sup> between the United Nations and a specific state in prosecuting human rights violations before an international hybrid forum. The *Rome Statute* of the International Criminal Court of 1998 requires in general voluntary accession as a precondition for the exercise of its jurisdiction and allows only one "coerced" option for the exercise of jurisdiction as stipulated by Article 13 (b) of its *Statute*.<sup>36</sup>

The law of Nuremberg resembled new, "retroactive", law in the sense that it was codified after the commission of the crimes in question for the purpose of holding the German military and political leaders *ex post facto* criminally

<sup>30</sup> See Wright, *supra* note 25 at 46 with reference to case law on the judicial competence of courts and state sovereignty.

<sup>31</sup> Chapter VII of the *Charter* of the United Nations of June 26, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, entered into force Oct. 24, 1945, provides for measures in the connection to "Action with respect to threats to the peace, breaches of the peace, and acts of aggression".

<sup>32</sup> *C.f.* the UN evolving doctrine of the responsibility to protect (R2P), see e.g. the 2005 World Summit Outcome, UN doc. A/60/L.1, 15 September 2005, paras 138 to 139.

<sup>33</sup> Such as genocide, crimes against humanity and war crimes; with the responsibility to protect outlined in the UNSG Report, *Implementing the Responsibility to Protect*, UN doc. A/63/677 of 12 January 2009.

<sup>34</sup> Chapter VII measures can thus overrule sovereignty of the state in question. See *Prosecutor v Tadic* 1995 case no. IT-94-1-AR72, 1162 at para 27.

<sup>35</sup> See Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000. UN Doc S/RES/1315.

<sup>36</sup> Article 13 (b) allows the referral of "a situation in which one or more of such crimes appears to have been committed [...] to the Prosecutor by the Security Council acting under chapter VII of the *Charter* of the United Nations". Examples hereof are the 2010 indictment of the Sudanese President Al-Bashir (*Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09) as consequence of an earlier UN SC referral of the Darfur, Sudan, human rights crisis to the international criminal court under Security Council resolution 1593 (2005). The recent request by the ICC prosecutor to the ICC for issuing an arrest warrant for the Libyan leader al-Qadhafi and one of his sons is such an exception in terms of Article 13 (b), see International Criminal Court, "Press Release", ICC-CPI-20110516-PR667, "ICC Prosecutor: Gaddafi used his absolute authority to commit crimes in Libya" (16 May 2011) online: ICC <<http://www.icc-int.int/NR/exeres/1365E3B7-8152-4456-942C-A5CD5A51E829.htm>>.

accountable, as explicitly stated in Article 6 (c) of the *Nuremberg Charter*.<sup>37</sup> The *ex post facto* nature of the law of Nuremberg would constitute a violation of international law in the absence of applicable exceptions. The law of Nuremberg itself could provide such an exception because as Kelsen points out that “the application of unknown law is not without exceptions. The rule is effective only with respect to legislation, not against the creation of law by custom or judicial decisions”.<sup>38</sup> Given this, the question arises whether such an exception could have been found in the existence of custom(s) criminalizing certain acts at the time of their commission by the accused. If that was the case, the fact that the law of Nuremberg had been new and retroactive law would not constitute a violation of international law thanks to the existence of such a customary law exception.

### C. The legality of the retroactive crime against peace – selective justice or international criminal justice in progression?

Acts of “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements...” which would today qualify as the crime of aggression (under Article 8bis of the *Rome Statute* of the ICC which is not in operation yet) were criminalised as so called “crimes against peace” under Article 6(a) *Nuremberg Charter*.<sup>39</sup>

Examples of such crimes against peace were the German attack on Poland in September 1939 or the attack on “neutral” Denmark in 1940.<sup>40</sup> This crime constituted a “leadership” crime and was used to prosecute members of the German military high command<sup>41</sup> as well as the political leadership which had been involved in the decision-making processes before and during the war.

Such crimes against peace were criminalized for the first time in the *Nuremberg Charter*: prior hereto and until the outbreak of World War I, the “right” of a state to resort to war, the *jus ad bellum*, was most widely regarded only as “a mere continuation of [state] politics by other means”.<sup>42</sup> With the end of the first global war in 1918 this perception changed: war had become an outlawed means of inter-state affairs. The victors of World War I, the so called “Entente” powers, condemned aggressive war in Article 227 of the *Treaty of Versailles* of 1919 as a “supreme offence against international morality and the sanctity of treaties” and contemplated trying the German Emperor, William II of Hohenzollern, responsible for the crime of waging war by siding with the Austrian

<sup>37</sup> Article 6 “whether or not in violation of the domestic law of the country where perpetrated.” See Werner Renz’s essay, “Völkermord als Strafsache. Vor 35 Jahren sprach das Frankfurter Schwurgericht das Urteil im großen Ausschwitz-Prozess”, online: Fritz Bauer Institute <[http://www.fritz-bauer-institut.de/texte/ess-ay/08-00\\_renz.htm](http://www.fritz-bauer-institut.de/texte/ess-ay/08-00_renz.htm)>, 6 ff.

<sup>38</sup> Kelsen, *supra* note 29 at 9.

<sup>39</sup> See discussion of Art. 8bis *Rome Statute* below.

<sup>40</sup> Whether the Franco-British declaration of war on Germany of 3 September 1939 as a consequence of the German attack on Poland falls within the wider category of a crime against peace is debatable, the same question arises in the context of the Soviet attack on Poland in the second half of September 1939 as part of the Soviet German Molotov – Ribbentrop Non-Aggression Pact, the Soviet aggression in 1939 and finally the failed Anglo-British landings in (then neutral) Norway, the latter action which would today fall under today’s terminology of “pre-emptive” self-defence.

<sup>41</sup> The OKW, the Oberkommando der Wehrmacht, the High Command of the then German defence force.

<sup>42</sup> Carl Von Clausewitz, *On War*, Book I trans by Col JJ Graham (London: N Trübner, 1873) at 24.

and Hungarian Empire in declaring war on the Kingdom of Serbia in August 1914. The attack on the neutral Kingdom of Belgium was regarded as such a crime against peace. A prosecution of the Kaiser for aggression was regarded as a possible application of retroactive law<sup>43</sup> and consequently dropped.

The *Covenant* of the League of Nations of 1919 condemned but did not criminalise the unlawful resort to war and promoted peaceful means of conflict resolution.<sup>44</sup> Possible collective enforcement could – in theory – utilise economic sanctions and even military actions.<sup>45</sup>

The *Kellogg-Briand Treaty* (or *Paris Treaty*)<sup>46</sup> of 1928 was a further step to outlaw war: it renounced war as a legitimate instrument of any state policy.<sup>47</sup> Unlike the *Versailles Treaty* of 1919, which constituted a victor's "peace treaty" necessary for ascertaining "war guilt", the *Paris Treaty* resembled a multilateral treaty with voluntary membership. The *Paris Treaty* was not very successful in terms of keeping the peace: the internationalisation of the Spanish "civil war" in 1936 to 1939,<sup>48</sup> Italy's Abyssinian campaign of 1937 the German attack on Poland in September 1939, and aggressive Japanese imperialism, showed an apparent lack of willingness to comply with these noble treaty resolutions.

Some early attempts to criminalize war can be seen in the 1923 Draft Treaty of Mutual Assistance of the League of Nations and the (non ratified) League of Nations' Protocol for the Pacific Settlement of International Disputes, the so called "Geneva Protocol", of 1924. Article 1 of the Assistance Treaty states "that aggressive war is an international crime," and that the parties would "undertake that no one of them will be guilty of its commission."<sup>49</sup> The Geneva Protocol provided that "a war of aggression constitutes a violation of this solidarity and is an international crime."<sup>50</sup>

In the absence of binding criminal law principles, the acts of planning, preparing and finally waging war against Poland in 1939 would not have qualified as crimes under international law but nevertheless as collusion in acts leading to breaches of international law resulting in inter-state (tort) responsibility with reparations for the offending state, as witnessed in the seminal *Chorzow Factory*

<sup>43</sup> Moghalu, *supra* note 25 at 22. Other attempts to try him for war crimes were also futile and the German Emperor was, eventually to die in Dutch exile in 1941.

<sup>44</sup> See "Preamble" of the *Covenant* of the League of Nations; Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005) at 37.

<sup>45</sup> *Covenant* of the League of Nations, articles 11 and 16 respectively – the League's sanctions against Mussolini's Fascist Italy in the mid-thirties for its war of aggression in Abyssinia was the only more notable peace enforcement action by the League and directly led to the advent of the German-Italian detente and eventual coalition.

<sup>46</sup> *Kellogg-Briand Treaty* (27 August 1928).

<sup>47</sup> Art 1 of the *Kellogg-Briand Treaty* "condemn[s] recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"

<sup>48</sup> While the UK and France adapted – officially a policy of non-intervention, the Nationalists under Franco enjoyed Italian, German and partly US support, while the USSR supported the Republican side.

<sup>49</sup> Draft *Treaty of Mutual Assistance*, Article 1

<sup>50</sup> "Preamble", *Geneva Protocol*. The protocol was recommended to the members of the League but never ratified.

case before the Permanent Court of Justice in 1927.<sup>51</sup> This view is supported in the findings of the sub-committee of the legal committee of the United Nations War Crimes Commission [UNWCC] in its majority report of 1945 whereby “acts committed by individuals merely for the purpose of preparing and launching aggressive war, are *lege lata*, not “war crimes”.<sup>52</sup> The decision to establish criminal accountability before the IMT in the end followed the overall consensus, whereas, acts of crimes against peace “are of such gravity that they should be made the subject of a formal condemnation in the peace treaties. It is desirable that for the future penal sanctions should be provided for such grave outrages (...)”<sup>53</sup> This view was confirmed in United Nations General Assembly Resolution 95 (I) in 1946.<sup>54</sup>

As explained above, the law of Nuremberg regarded these offences as crimes under existing (customary) international law principles and not just as non-punishable violations of international law. The IMT based this view on basically two arguments: firstly that the *Nuremberg Charter* constituted the expression and manifestation of international law in existence at the time of its creation and as such contributed directly to the formation of (new) international law;<sup>55</sup> and, secondly, that punishment for crimes which were not punishable/prosecutable at the time of their commission should be allowed if the absence of punishment would otherwise appear to be “unjust”:<sup>56</sup>

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished<sup>57</sup>

Following the above-mentioned UNWCC majority report and the comments by Kelsen<sup>58</sup> it has to be concluded that at the time of the commission of the respective acts, individual criminal responsibility for the act of resorting to the use of force could not have been legally established under international law: firstly because of a lack of precise multilateral criminal provisions, secondly a respective customary law provision did not exist at the time of their commission and thirdly because of the non-retroactivity principle as a non-derogable principle of international law

<sup>51</sup> See Case Concerning the Factory at Chorzow, 1927 PCIJ (Ser. A) No. 9; the PCIJ was the predecessor of the International Court of Justice.

<sup>52</sup> UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Law of War* (London: HMSO, 1948) at 182.  
<sup>53</sup> *Ibid.*

<sup>54</sup> See UN Doc A/ 64/ ADD.1.

<sup>55</sup> Kress, *supra* note 26 at 4; Cassese, *supra* note 44 at 440, citing a defence motion during the IMT hearings, in Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946 (Nuremberg, 1947), Nuremberg I, at 168-9.

<sup>56</sup> Cassese, *Ibid* at 439-440 (reference to a discussion among the Allies at that time).

<sup>57</sup> Trial of German War Criminals (Judgment) Nuremberg International Military Tribunal (30 September and 1 October) 41 AJIL (1947) reproduced in B Ferencz, *An International Criminal Court*, Vol I, (Sydney: Oceana Publications, 1980) at 477.

<sup>58</sup> See Kelsen, *supra* note 29 at 10.

and whose derogation was not covered by one of the exceptions discussed above by Kelsen.

The fact alone that the IMT, as a legal predecessor to the current international tribunals, was forced on defeated Germany with obvious disregard and indifference to her sovereignty and jurisdiction had to lead eventually to questions *re*: its legality and overall impact. Following the rationale of Kelsen, this legality “deficit” in respect to the crime against peace continues to exist unless and until subsequent universal acceptance and actual usage of proceedings and findings of the IMT in the form of the Nuremberg principles<sup>59</sup> as part of customary international law<sup>60</sup> occur, thus legitimizing the law of Nuremberg under international law as part of customary international law. Custom requires both *usus* and *opinio juris*; state practice and a corresponding view among states.

The law lords of the (former) House of Lords (the new Supreme Court) took the view in their judgment in *R v Jones* (2006)<sup>61</sup> that individual criminal responsibility for the crime of aggression could be based on customary international law developed since the coming into force of the *Nuremberg Charter* in 1945, notwithstanding the absence of any international codification of the crime of aggression (that is prior to the Kampala Review Conference, discussed below). Authors and commentators generally agree with this characterization of aggression as a crime under customary international law, albeit with a narrow and not expansive scope.<sup>62</sup>

The legacy of Nuremberg and the failure/reluctance to make observance of the Nuremberg Principles the mandatory yardstick of our foreign and security policy continue to affect modern day attempts to effectively criminalise aggression – even though the adoption of the definition at Kampala represents some progress. The question is whether a revision of Nuremberg’s legacy has already started? We submit that the very inclusion of the crime against peace within the structure of the crime of aggression for purposes of the ICC necessitates such a revision – not for the sake of revision, but for the sake of future legal certainty.

### III. AGGRESSION UNDER THE ICC STATUTE POST KAMPALA

In spite of the controversy surrounding the legality of the Nuremberg trial, the legal and judicial precedents set by the law of Nuremberg and its trials did mark the “start of international criminal law *stricto sensu*”<sup>63</sup> which at least in theory applied to former victors and defeated alike: “while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those who sit now in

<sup>59</sup> See “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal”, in *Report of the International Law Commission Covering its Second Session*, 5 Jun-29 Jul 1950, UN Doc. A/1316, 11-14.

<sup>60</sup> Cassese, *supra* note 44 at 157, see *Tadic* (Appeal), ICTY Appeals Chamber 15 July 1999 (case no IT-94-I-A) at paras 282-6 where the court confirms that the IMT among other international criminal law statutes (such as the ICTY and ICTR Statutes) form part of international law.

<sup>61</sup> *R v Jones* [2006] UKHL 16

<sup>62</sup> See authorities discussed by Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Belgium: Intersentia, 2010) at 144-148.

<sup>63</sup> Clauss Kress & Leonie von Holtendorff, “The Kampala Compromise on the Crime of Aggression” (2010) 8 *Journal of International Criminal Justice* 1179 at 1180.

judgment”<sup>64</sup> Some argue that the crime of aggression “was very much at the heart of” this historic moment.<sup>65</sup> The unfinished business of adopting a definition of aggression for purposes of the *Rome Statute* (and ICC jurisdiction) therefore remained an ironic reminder of the progress, but also the difficulties, of international criminal law. The eventual adoption of a resolution on the crime of aggression at the Kampala Review Conference on the *Rome Statute* can be seen as an important confirmation and affirmation of the process that really started at Nuremberg. In historical terms, the Nuremberg to Kampala narrative should rightly be seen as one of the great epochs of international criminal law-making. But, as always, the devil is in the detail.

The definition of aggression (Article 8bis) and conditions for the exercise of ICC jurisdiction (Articles 15bis and 15ter)<sup>66</sup> were adopted at Kampala in June 2010.<sup>67</sup> The adoption was preceded by a lengthy drafting process (conducted by a Special Working Group), which resulted in a report which was in turn adopted by the Assembly of States Parties in November 2009.<sup>68</sup> The quality of the pre-Kampala work was such that the Working Group report (as adopted by the Assembly of States Parties) was eventually adopted by the Review Conference at Kampala.<sup>69</sup> The definition of aggression to be included in the *Rome Statute* reads as follows:

Article 8bis  
Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United

<sup>64</sup> Justice R. Jackson in “Summary review of the Indictment and the Charter and their legal foundations” in *Judgement 1: The Trial of German major war criminals, Proceedings of the International Military tribunal sitting at Nuremberg, Germany*, (London: HM Stationary Office, 1946) at 85.

<sup>65</sup> *Ibid*; Mohammed Aziz Shukri, “Individual Responsibility for the Crime of Aggression” in Roberto Bellelli, ed, *International Criminal Justice – Law and Practice from the Rome Statute to Its Review* (Surrey: Ashgate, 2010) 519 at 529–530.

<sup>66</sup> For a discussion of the role of the Security Council see Bartłomiej Krzan “Frieden und Gerechtigkeit nach der Kampala-Konferenz: Einige Überlegungen zur Rolle des Sicherheitsrats in der Völkerstrafgerichtsbarkeit” (2010) 48 *Archiv des Völkerrechts* 467.

<sup>67</sup> See Res.RC/Res.6, advance version, 16 June 2010 online: International Criminal Court <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>68</sup> For a comprehensive discussion of the drafting and diplomacy involved, see Kemp, *supra* note 62 at 207-237.

<sup>69</sup> Kai Ambos “The crime of aggression after Kampala” (2010) 53 *German Yearbook of International Law* 463 at 467.

Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The above definition will not be analysed in detail here. For purposes of this contribution a number of relevant features will be discussed. In particular, the implications of the definition of aggression for the “post-9/11” world, as well as for possible responses to new Hybrid Threats to international peace and security will be pointed out.

It is clear from the text that the Kampala definition constitutes a marriage between Nuremberg and the 1974 General Assembly definition of aggression, with some modifications. Aggression under article 8bis is now a leadership crime *par excellence*.<sup>70</sup> The language seems to suggest a stricter approach than the Nuremberg process, where individual liability was framed with reference to individuals who could “shape or influence policy”. “Effective control” (Article 8bis (1)) could limit individual liability to the exclusion of individuals who, for instance, merely influenced policy.<sup>71</sup> This view of “leadership”, combined with the state-centric approach to the crime of aggression, underscores the difficulty in

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<sup>70</sup> Art 8bis (1) read with art 25 (3bis); see analysis by Kemp *supra* note 62 at 236-237; Ambos, *ibid* at 468.

<sup>71</sup> Ambos, *supra* note 69 at 490. For a more nuanced view on “leadership”, see Kemp, *supra* note 62 at 236-237.

extending the crime of aggression to “post-bureaucratic forms of organization as represented, for example, by paramilitary or terrorist non-State actors.”<sup>72</sup>

An important aspect of Article 8bis, paragraph 1 is the threshold qualification. The act that constitutes the “crime of aggression” must constitute by its character, gravity and scale a manifest violation of the *Charter* of the United Nations. However, as pointed out by commentators,<sup>73</sup> the individual conduct required in terms of the Kampala definition is more in line with the Nuremberg and Tokyo precedents, namely planning, preparation and initiation or execution. The qualitative aspect of Article 8bis (1) links the state act with the normative protection of the United Nations *Charter* against manifest violations, thus excluding minor incidents of violations of state sovereignty or “legally controversial cases” like humanitarian intervention from the ambit of the crime of aggression<sup>74</sup> (for ICC purposes). But this qualitative aspect can be criticised as vague, perhaps too vague for purposes of criminalisation.<sup>75</sup> However we agree with Ambos’s view, that “the lack of precision is embedded in the primary norm regulating the use of force.” Thus, “if it is not possible to clearly delimitate lawful from unlawful uses of force, how could the lines be drawn any more clearly at the level of the secondary norm criminalizing the unlawful use of force”<sup>76</sup> (per Article 8bis)?

The criminalization (under Article 8bis (1)) of the unlawful use of force is structurally linked to the use of force by a State, and this state-centric approach is underlined by the inclusion in Article 8bis (2) of reference to General Assembly Resolution 3314 on Aggression. Whilst broad support was given during the pre-Kampala processes to the inclusion of Resolution 3314 in the definition of aggression,<sup>77</sup> the eventual inclusion only confirms the pragmatic inclination of the negotiators and still does not “capture modern forms of aggression carried out by non-State actors in asymmetric conflicts”.<sup>78</sup> The roots of this can arguably be traced to the debate about the scope of the 1974 Definition of Aggression itself. The recently independent states, members of the so-called Non-Alignment Movement [NUM], and the Soviet Union with its client-states, took the view that wars of national liberation were exceptions to UN *Charter’s* Article 2(4) prohibition of the use of force. The 1974 Definition thus incorporated the idea that people(s) can (and should legally be able to) struggle for self-determination – and

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<sup>72</sup> Ambos, *supra* note 69 at 492.

<sup>73</sup> *Ibid* at 468.

<sup>74</sup> *Ibid* at 482-483; Kemp, *supra* note 62 at 234 where the author argues that the criminalization of aggression for ICC purposes should “as closely as possible keep to the historical roots of the crime under international law – that is the criminalization of the *jus contra bellum*, and not mere (relatively) trivial international incidents or violations of international law.” Of course, the content of the *jus contra bellum* is not static, as is shown in this contribution.

<sup>75</sup> See generally, Sean D Murphy “Aggression, legitimacy and the International Criminal Court” (2009) 20 EJIL 1147 at 1147 and 1150-1151.

<sup>76</sup> Ambos, *supra* note 69 at 484.

<sup>77</sup> See discussion by Kemp, *supra* note 62 at 218.

<sup>78</sup> Ambos, *supra* note 69 at 488.

this may include the use of armed force.<sup>79</sup> Article 7 of the 1974 Definition reads as follows:

Nothing in this Definition, and in particular Article 3 [specific acts of aggression], could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

The contours of the debate about the definition of aggression for purposes of the International Criminal Court followed many of the same fault lines and divisions that informed the debate preceding the 1974 General Assembly Definition of Aggression. Ultimately, the specific acts of aggression as listed in Article 3 of the 1974 Definition found their way into Article 8bis of the Kampala Resolution on Aggression, while Article 7 of the 1974 Definition did not. The various reports of the Special Working Group on the Crime of Aggression (which did all the pre-Kampala work on the draft definition of aggression and the draft conditions for the exercise of jurisdiction over the crime of aggression by the International Criminal Court) reflect the point of view of some states that all the articles in the 1974 Definition of Aggression are interlinked and should thus form a unitary basis for the (at that stage) proposed definition of aggression for purposes of the *ICC Statute*. This apparent political approach (which was not so much concerned about the fact that the 1974 Definition was not drafted with individual criminal liability in mind) was ultimately rejected.<sup>80</sup> The Kampala resolution on the definition of aggression thus reflects a more traditional state-centred approach to acts of aggression, without any explicit reference to exceptions for national liberation struggles and wars of national liberation.

Apart from the question about possible acts of aggression committed by non-state actors, referred to above, a related future issue (in the context of ICC jurisdiction over the crime of aggression) could be the question of acceptance of ICC jurisdiction by non-state actors and entities, such as national liberation movements or indeed non-states such as Palestine (on the assumption that this entity does not become a state and full member of the UN in the near future). The question of Palestinian statehood is a complex and ever evolving one,<sup>81</sup> and not the focus of this contribution. However, against the background of that debate, it is

<sup>79</sup> Kemp, *supra* note 62 at 67; Albrecht Randelzhofer “Article 2(4)” in Bruno Simma, ed, *The Charter of the United Nations – A Commentary* 2<sup>nd</sup> Edition Vol 1 (Oxford: CH Beck Verlag/Oxford University Press, 2002) 112 at 128-129.

<sup>80</sup> Kemp, *supra* note 62 at 222.

<sup>81</sup> For a discussion, see Felix Dane & Ilona-Margarita Stettner “A Palestinian State in the United Nations?” in Stefan Burgdörfer, ed, *International Reports, 8/11* (Berlin: Konrad Adenauer Stiftung, 2011) 51.

submitted that the state-centred jurisdictional regime of Article 12 of the *Rome Statute* of the ICC precludes ICC jurisdiction over situations where a non-state entity would on an ad hoc basis accept ICC jurisdiction – even where such an entity (for instance a national liberation movement or even an entity in *statu nascendi*) would be in de facto control of a certain territory. We agree with the sensible conclusion of Yaël Ronen:

Interpreting Article 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute’s wording and the intention of its drafters. Any involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity.<sup>82</sup>

If individual criminal liability for aggression is the aim of Article 8bis (as indeed it is), then we agree, in principle, with Ambos that essentially the crime of aggression “is not so much determined by the actor but by the wrongfulness of the act.”<sup>83</sup> Of course that brings us back to the fundamental debate about the content of the *jus ad bellum*, and the meaning of wrongfulness, the questions at the heart of this contribution. Article 8bis (2) is clearly not aimed at non-state acts of aggression. It is also not wise or permissible under criminal law doctrine to extend the list by way of analogy.<sup>84</sup> Is the answer perhaps to first tackle the first norm – the prohibition of the use of force – and then get back to the secondary norm – the criminalization of the unlawful use of force? That would be in line with the approach first taken at Nuremberg (albeit controversially as pointed out above) and later essentially repeated at Kampala, although this time on sound legal and political ground.

So what are these future challenges and how would they impact on our understanding of the modern “crime against peace”; the crime of aggression?

#### **IV. SOME CONCLUDING OBSERVATIONS ON FUTURE MILITARY CHALLENGES AND THEIR POSSIBLE IMPACT ON THE NOTION OF THE USE OF FORCE AND THE CRIME OF AGGRESSION**

The gravest danger to freedom lies at the crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology-when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to

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<sup>82</sup> Yaël Ronen “ICC jurisdiction over acts committed in the Gaza Strip – Article 12(3) of the ICC Statute and Non-state entities” (2010) 8 *Journal of International Criminal Justice* 3 at 26-27.

<sup>83</sup> *Ibid.*

<sup>84</sup> See also comments by Ambos, *supra* note 69 at 489 and Kemp, *supra* note 62 at 236.

blackmail us, or to harm us, or to harm our friends-and we will oppose them with all our power.<sup>85</sup>

This article concludes with a sobering prediction: it is the opinion of the authors that the present legal concepts on the use of military force, the *jus ad bellum*, have become relatively anachronistic, if not partially outdated 20<sup>th</sup> century concepts which will not suffice when dealing with the present security threats and challenges of the 21<sup>st</sup> century. The above quote from the National Security Strategy of 2002 was designed to authorize former US president George Bush's Administration to take pre-emptive action whenever the "United States cannot remain idle while dangers gather"<sup>86</sup> and meant to counter threats involving the use of WMDs<sup>87</sup> by rogue states and armed terrorist groups such as Al Qaeda. The emergence of new threats makes an extension of this doctrine not unlikely.

Hybrid attack scenarios (combining a multitude of low intensity and even "virtual" threats),<sup>88</sup> non-state threats in the developing world including asymmetric war scenarios (from international terrorism to piracy) new fifth dimensional threats such as cyber warfare, and finally frequent humanitarian intervention scenarios (albeit under a different name) in response to human rights disasters at a massive scale (caused by environmental and political/religious forces) will significantly influence the way we perceive present concepts and doctrines of the legality of the use of military force in contemporary politics and question our traditional focus on state aggression as a condition for the exercise of self-defence in terms of Article 51 United Nations Charter.<sup>89</sup>

To highlight some of these future threats to international peace and security we would like to use the example of cyber war in a so called "Hybrid Threats" scenario. Cyber War<sup>90</sup> basically refers to a sustained computer-based cyber-attack by a state (or non-state actor) against the IT - infrastructure of a target state: an example of such hostile action taking place in the fifth dimension of warfare is the 2007 Russian attempt to virtually block out Estonia's internet infrastructure as a unilateral countermeasure and retribution for Estonia's removal of a WW II Soviet

<sup>85</sup> The White House, "The National Security Strategy of the United States of America, of 17 Sep 2002" online: White House <[www.whitehouse.gov/nsc/nss](http://www.whitehouse.gov/nsc/nss)> at 17.

<sup>86</sup> *Ibid* at 19.

<sup>87</sup> Weapons of mass destruction, refers to nuclear, biological and chemical weapons.

<sup>88</sup> The author Bachmann is part of NATO's hybrid threat study group which met in 2011 in Tallinn, Estonia and Brussels, Belgium for a workshop meetings on these new type of threats, see *supra* note 10. His work focuses on the complementarity of "kinetic" and alternative forms of deterrence for aiders and abettors of international terrorism in a hybrid threat context discussing the impact and effect of "lethal" and "non-lethal" responses, see e.g. Sascha-Dominik Bachmann, "Terrorism Litigation As Deterrence Under International Law – From Protecting Human Rights to Countering Hybrid Threats" (2011) 87 *Amicus Curiae* 22 and also "Hybrid Threats, cyber warfare and NATO's comprehensive approach for countering 21<sup>st</sup> century threats – mapping the new frontier of global risk and security management" (2012) 88 *Amicus Curiae* 14.

<sup>89</sup> International Court of Justice "Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory Advisory Opinion" (2004) 43 *ILM*, 1009 at para 139. For the full dockets, see online: ICJ <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>>

<sup>90</sup> See generally, Jenny Döge "Cyber Warfare. Challenges for the Applicability of the Traditional Laws of War Regime" (2010) 48 *Archiv des Völkerrechts* 486.

War Memorial from the centre of Tallinn.<sup>91</sup> Governmental and party websites as well as businesses were severely hampered by this incident of cyber warfare. This incident of using cyber assets was followed by the employment of such cyber measures in connection with the Russian military campaign in Georgia in 2008. The most recent report on the use of a sophisticated use of a virus/worm to sabotage Iran’s nuclear weapons programmes, called Stuxnet, by presumably Israel, has highlighted both the technical advancement, possibilities as well as potential of such new means of conducting hostile actions in the fifth dimension of warfare.<sup>92</sup> The continuing and intensifying employment of such cyber-attacks by China against the USA, NATO, the European Union and the rest of the world has led the USA to respond by establishing a central Cyber War Command, the United States Cyber Command [USCYBERCOM] in 2010<sup>93</sup> to “conduct full-spectrum military cyberspace operations in order to enable actions in all domains, ensure US/Allied freedom of action in cyberspace and deny the same to our adversaries.”<sup>94</sup> Following these developments and – perhaps supplementing the work of USCYBERCOM - NATO set up a special hybrid threat study group which is studying possible responses to such threats, the so called NATO Transnet network on Countering Hybrid Threats [CHT].<sup>95</sup>

The repercussions for international lawyers in terms of possible responses to such challenges are significant and have not yet been discussed in terms of their full possible impact for the way we define war and peace within the concept of armed attack and individual and collective self-defence in terms of Articles 51, 2 (4) United Nations *Charter*, Article 5 NATO Treaty etc.

The authors are convinced that the definitions of the nature of an armed attack will change even further than already witnessed in the aftermath of 9/11<sup>96</sup> and will eventually give rise to a significant change in the present body of international law regulating the *jus ad bellum* and *jus in bello*.<sup>97</sup> Referring to and reflecting on the above cited US National Security Strategy [NSS]<sup>98</sup> and a recent analysis by Professor von Heintschel Heinegg<sup>99</sup> on the consequences of asymmetric warfare for the (wider) law of armed conflict, one quite likely consequence may be that we will witness the future use of military force to counter such cyber-attacks (and

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<sup>91</sup> See Ian Traynor, “Russian accused of unleashing cyberwar to disable Estonia”, *The Guardian* (17 May 2007) online: Guardian Unlimited <<http://www.guardian.co.uk/world/2007/may/17/top-stories3.russia>>.

<sup>92</sup> Christopher Williams, “Stuxnet: Cyber attack on Iran ‘was carried out by Western powers and Israel’”, *The Telegraph* (21 January 2011) online: The Telegraph <<http://www.telegraph.co.uk/technology/8274009/Stuxnet-Cyber-attack-on-Iran-was-carried-out-by-Western-powers-and-Israel.html>>.

<sup>93</sup> With the decision taken in 2009, and initial operational capability as of 2010, see online: United States Strategic Command <[http://www.stratcom.mil/factsheets/Cyber\\_Command/](http://www.stratcom.mil/factsheets/Cyber_Command/)>.

<sup>94</sup> *Ibid.*

<sup>95</sup> See *supra* note 10.

<sup>96</sup> See above for the 9/12 UN SC Res which qualified the terrorist attacks as armed attack thus “authorising” the use of military force among other means.

<sup>97</sup> *C.f.* Article 49 of the First Additional Protocol to the *Geneva Conventions*, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

<sup>98</sup> The White House, *supra* note 85 at 15.

<sup>99</sup> W H Heinegg, “Assymmetric Warfare” in *Max Planck Encyclopedia of Public International Law* online: Max Planck Encyclopedia <<http://www.mpepil.com>>.

other Hybrid Threats) directed against “hostile” (*aka* enemy infrastructure), as well as individual high profile targets of both state and non-state actor quality.

Linked to this observation is a cultural dimension which may see the development of a legal perception which differs from the existing, mostly western, historically founded view on the question on the legality of the use of force. The 21<sup>st</sup> century will be the century of new global players (with China and India as re-emerged global powers) exercising their own brand of economic and military might: their cultural and strategic outlook and understanding on the discussed concepts will determine the fate of the present state of affairs: whether our Western shaped concepts of peace and security and the legacy of Nuremberg will prevail.

The above mentioned “Jasmine” revolution will have far reaching consequences for the Maghreb region as such: whether the “Arab spring” will herald the advent of democracy, peace and stability in the region has to be seen. While these events have not led to a – much feared - strengthening of the most violent and radical Islamist groups such as Al Qaeda, other fundamental non secular Islamist groups such as the Muslim Brotherhood in Egypt and Syria as well as Al-Nahda in Tunisia have significantly gained in terms of public support. The on-going detente between Hamas in Gaza and Al Fatah in the West Bank is a direct consequence of these events and may impact the future of Palestinian - Israeli affairs. The Palestinian - Israeli conflict will see a new phase where the West’s open support for the Arab spring will dictate new “rules of engagement” when dealing with Palestinian rights and positions: new expectations have been created with the potential of possible violent conflict scenarios arising from disappointment as well as from the re-emergence of suppressed ethnic and religious rivalries within the region.

Concluding, one can observe that Hybrid Threats, low threshold regional conflicts, as well as asymmetric conflict scenarios which have little in common with traditional 20th century warfare, will be more frequent in this century and will require means and ways of “flexible responsiveness” through escalating levels of confrontation and assets deployed. Future military roles and operations taking place in so called “steady state” environment conflict scenarios will be more flexible in terms of choice of military assets and objectives, but also more frequent. The present concepts of “crisis management” responses will develop further into more pronounced military roles and responsibilities of a more “dynamic” nature. One potential casualty of these new threats might be the infant definition of aggression as adopted at the Kampala Review Conference of the *Rome Statute* of the International Criminal Court. The Kampala definition (which might not even enter into force because of a lack of ratifications) is, all legal and political matters considered, as good a definition as can be expected for the complex crime of aggression. However, in a very real sense the Kampala Definition is also a snapshot of the politico-legal realities of the 20<sup>th</sup> century. By not providing for non-state actors in the list of acts of aggression, the Kampala Definition will be at the mercy of new and Hybrid Threats to peace and security. To the extent that the Kampala Definition can be viewed as a culmination (or confirmation) of the legacy of Nuremberg, the inherent weakness with respect to new and Hybrid Threats might be the 21<sup>st</sup> century equivalent of the international and domestic legal apathy and inaction that threatened and undermined the so-called legacy of Nuremberg.