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On Some Problematical Aspects of the Crime of Aggression

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Abstract
The essay argues that the absence of an international treaty definition of aggression in international law should not preclude the prosecution of its perpetrators. Two legal regimes of responsibility, namely the prohibition against aggression as an international wrongful act and the crime of aggression have been entangled. Once one separates the criminal liability of individuals from state responsibility, a definition of the crime of aggression can be seen. According to the author, the contours of such a new definition contain the requisite degree of certainty for judicial approaches instead of merely political approaches. Consideration is also given as to whether conspiracy to wage a war of aggression may also be regarded as a separate crime within international criminal law.

Key words
crime of aggression; criminal liability of individuals; international criminal law; state responsibility

The modest and tentative considerations below are offered to John Dugard in friendship and admiration. Both as an academic and as a practitioner he has constantly fought, first in South Africa and then on the world scene, for respect for law and human rights. Rendering it possible to make individuals who engage in aggression criminally accountable is no doubt one of the goals that he considers worth pursuing in the current world community.

1. The sudden emergence of the notion and its immediate falling into lethargy

It is common knowledge that aggression was first considered as an international crime of individuals in 1945, when the London Agreement was adopted.[1] It was

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1. The London Agreement of 8 August 1945 establishing the International Military Tribunal (IMT). Art. 6(a) of the IMT Charter, annexed to the Agreement, provided as follows: 'The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) CRIMES AGAINST PEACE: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing'.

punished as such in 1946–7 by a number of international criminal tribunals.[2] On 11 December 1946 the UN General Assembly unanimously adopted Resolution 95(I), by which it 'affirmed' the 'principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. Thus all the states that at that stage were members of the United Nations eventually approved of both the definition of crimes against peace and its application by the International Military Tribunals. At that stage the crime fell into oblivion. In 1974, when the UN General Assembly adopted a resolution containing the famous Definition of Aggression, the existence and punishability of aggression as a crime was substantially glossed over in silence.[3]

Not surprisingly, since 1947 there have been no international trials for alleged crimes of aggression, although undisputedly in many instances states have engaged in acts of aggression in breach of Article 2(4) of the UN Charter, and in a few cases the Security Council has determined that such acts were committed by states.[4] Only recently have alleged cases of aggression been brought before some national courts,[5] or have national prosecutors been requested to open investigations into alleged instances of aggression (such requests, however, have not been granted).[6]

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2. The IMT dwelt at some length in its judgment on this category of crimes to prove that (i) it had already been established before 1945; and (ii) consequently punishing the Nuremberg defendants for having committed these crimes did not fall foul of the *nullum crimen sine lege* principle. The IMT went so far as to define aggression as the 'supreme international crime' (at 186). Twelve defendants were found guilty on this count and sentenced either to death or to long terms of imprisonment. Control Council Law no. 10 (of 20 December 1945) also provided for aggression in Art. II(1)(a). Subsequently the Tokyo International Military Tribunal found 25 defendants guilty of aggression. Some of the US Military Tribunals established at Nuremberg also pronounced on aggression (see *Krauch and others* (so-called *IG Farben* case), *Trials of War Criminals*, VIII, at 1081 ff.; *Krupp and others*, *Trials of War Criminals*, IX, 1327 ff.; *von Weizsäcker and others* (so called *Ministries* trial), *Trials of War Criminals*, XIV, 308 ff.; *Wilhelm von Leeb and others* (so-called High Command trial), *Trials of War Criminals*, XI, 462 ff.) as well as the French Tribunals that adjudicated the *Röchlingen and others* case (16 June 1948, original French text in *La Documentation française*, 12 August 1948, *Notes documentaires et études*, no. 976, at 11. English summary in *Annual Digest 1948*, 398–404 and ibid., 404–12).

3. See UN General Assembly Resolution 3314 (XXIX) of 14 December 1974. It was deliberately incomplete, for Article 4 provided that the definition was not exhaustive and left to the Security Council a broad area of discretion, by stating that it was free to characterize other acts as aggression under the Charter. Furthermore, the resolution did not specify that aggression could entail both state responsibility and individual criminal liability: in Art. 5(2) of the Definition it simply provided that war of aggression is a crime against international law, adding that it 'gives rise to international responsibility'. The definition propounded in the Draft Code of Crimes against Peace and Security of Mankind, adopted by the International Law Commission (ILC) in 1996, although it specifically dealt with criminal liability for aggression, was rather circular and in fact did not provide any definition. Art. 16 of the Draft Code provided that 'An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state, shall be responsible for a crime of aggression' (UN Doc. A/51/332).

4. The Security Council defined as 'acts of aggression' certain actions or raids by South Africa and Israel; see, for example, UNSC Resolution 573 of 4 October 1985, on Israeli attacks on PLO targets, and UNSC Resolution 577 of 6 December 1985, on South Africa's attacks on Angola.

5. See *R. v. Jones et al.*, decided by the House of Lords on 29 March 2006. The appellants, who in 2003 had unlawfully entered British or NATO military bases in the United Kingdom to prevent what they considered to be preparations for a war of aggression against Iraq, had been charged with or convicted of causing criminal damage or aggravated trespass in British military bases. The House of Lords held that aggression is criminalized in international law; however, absent any statutory enactment in the United Kingdom incorporating the international customary law criminalizing aggression, the appellants were not entitled to rely upon that criminalization as a defence for the illegality of their action. On this decision see C. Villarino Villa, 'The Crime of Aggression before the House of Lords: Chronicle of a Death Foretold', (2006) 4 *Journal of International Criminal Justice* 866.

6. Pursuant to Art. 80 of the German Criminal Code (which criminalizes 'whoever prepares a war of aggression' in which Germany 'is supposed to participate') Germany's Chief Federal Prosecutor was requested in 1999

It is a fact that, although many national criminal codes provide for the crime of aggression,[7] no criminal action at the judicial level is being initiated. Similarly, although the Statute of the Supreme Iraqi Criminal Tribunal grants jurisdiction over the crime of aggression against other Arab countries,[8] so far nobody has been tried for such crime. All this is compounded by the fact that the Statute of the International Criminal Court (ICC), while envisaging the crime of aggression in Article 5, stipulates that the Court shall exercise jurisdiction over such crime once a provision defining it is adopted through an amendment of the Statute. It is striking that in the negotiations leading to the adoption in 1998 of the Statute of the ICC, no agreement was reached on the definition of aggression. Indeed, many African and Arab countries wanted to hold to the 1974 Definition, and even broaden it, while other states, including Germany, proposed solutions better tailored to suit the needs of criminal law. It would seem, however, that the main bone of contention was the role to be reserved to the UN Security Council. It was a matter of discussion whether its determinations were binding upon the Court, whether it could thus stop the Court from prosecuting alleged cases of aggression, or whether the Court should instead be free to make its own findings, whatever the deliberations of the supreme UN body. As stated above, in the event states agreed on Article 5(2) that in fact put off the matter until an amendment to the Statute is adopted by the Assembly of States Parties.

Why there was no international follow-up to the criminalization of aggression after 1947, whilst other crimes were spelled out in various conventions, is not difficult to grasp. There are many reasons for that.

First, in 1945–7 it was easy to penalize the leaders of the vanquished states: the war was over; it was patent that it had been initiated in blatant disregard of international treaties; it was felt necessary to react to it not only by resorting to the normal means used by victors (reparation for the wrongful acts – that is, payment

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to initiate prosecution into the alleged aggression against the Federal Republic of Yugoslavia (Serbia and Montenegro), in which German forces participated. He was then again requested to act in 2003, on account of the use of force in Iraq by US and British forces (German officials were allegedly responsible for allowing US bases in Germany to be used for activities related to military actions against Iraq). In both cases the Prosecutor declined to initiate investigations. On this matter see C. Kress, 'The German Chief Federal Prosecutor's Decision not to Investigate the Alleged Crime of Preparing Aggression against Iraq', (2004) 2 *Journal of International Criminal Justice* 245.

7. For instance, see the following provisions of criminal codes: Art. 80 of the German Criminal Code ('Whoever prepares a war of aggression ([envisaged in] Art.26 para. 1 of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for no less that ten years'); of Bulgaria (Art. 409), the Russian Federation (Art. 353); Ukraine (Art. 437); Armenia (Art. 384); Uzbekistan (Art. 151); Tajikistan (Art. 395); Latvia (Para. 72), Moldova (Art. 139), Macedonia (Art. 415). See http://www.legislationonline.org. See also Art. 1 of the Iraqi Law no. 7 of 17 August 1958 (which criminalizes 'Using the country's armed forces against the brotherly Arab countries threatening to use such forces or instigating foreign powers to jeopardize its security or plotting to overthrow the existing regime or interfere in their internal affairs against its own interest, or spending money for plotting against them or giving refuge to the plotters against them or attacking in international fields or through publications their heads of state').

8. Art. 14(3) of the 2005 Law establishing the Tribunal confers on the Tribunal jurisdiction over 'The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the Iraqi armed forces against an Arab country, in accordance with Art. 1 of Law 7 of 1958'. For the text of that Article 1, see *supra* note 7. For a view different from that set out here, see C. Kress, 'The Iraqi Special Tribunal and the Crime of Aggression', (2004) 2 *Journal of International Criminal Justice* 347.

by the vanquished states of huge sums of money as war reparations), but also, more dramatically, by making criminally accountable the single individuals who in some way had willingly participated in the planning and waging of the war. The written provisions of the Tribunals' Statutes criminalizing aggression were held to be sufficient, supplemented by general notions of criminal law (intent or knowledge as subjective ingredients of the crime).

Second, in 1945 the UN Charter established for the future a system of bans and permissions in the area of use of military force: such force was prohibited in international relations (Art. 2(4)); it was instead allowed if authorized by the Security Council (Arts. 42–49 of the UN Charter) or in self-defence (Art. 51). However, while the ban was crystal clear, the permission was in some respects fuzzy. In particular, it was controversial whether anticipatory self-defence was allowed, and if so under what conditions. True, the better interpretation of Article 51 seems to be that self-defence is lawful when an armed attack by another state is imminent (*pre-emptive* self-defence, as in the case of Israel in 1967, when the international community did not object to Israel's attack to forestall the impending invasion by some Arab countries); instead, anticipatory self-defence is unlawful when the attack is launched to prevent a possible future aggression (*preventive* self-defence, as in the case of the Israeli 1981 attack on Iraq to destroy the Osirak nuclear reactor, an attack the Security Council condemned in Resolution 487 (1981)). The fact, however, remains that this interpretation is not upheld by all members of the international community. This looseness of the international legal regulation of the exception to the ban perforce impinged upon the ban: obviously, when self-defence is allowed the prohibition on military force is not breached and therefore a state may not be termed aggressor. This grey area of international legal regulation, calculated to give states much leeway in practice, a fortiori rendered the criminalization of aggression problematic, given that international criminal law, as any body of criminal law, requires legal precision in the interest of the accused.

Third, the Cold War prompted members of the two blocs to refrain from fleshing out the rules on the crime of aggression, for fear that they might be used in the ideological and political struggle between the blocs. Furthermore, there was a general hesitancy by all major powers to elaborate upon aggression, so as to retain as much latitude as possible in the application of the rules on self-defence. The definition of aggression remained to a large extent in abeyance.

Now that there seems to be a broad interest in reviving the notion and in spelling out its legal contours, it may be of some interest to draw attention to some of the '*acquis*' of the past experience, so as to build on them.

2. The need to disentangle criminal liability of individuals from state responsibility: the two different legal regimes

To my mind it would be fallacious to hold the view that, since no general agreement has been reached in the world community on a *treaty definition* of aggression, perpetrators of this crime may not be prosecuted and punished. The ruling in

R. v. *Jones et al.*, issued in 2006 by the House of Lords, bears out this view. The House unanimously held that aggression is criminalized under customary international law. Lord Bighman of Cornhill, at paragraph 19, as well as Lord Hoffmann (para. 59) and Lord Mance (at para. 99) explicitly stated that, contrary to what the Court of Appeals had held in the same case (paras. 24–30), the crime of aggression does not lack the certainty of definition required for a criminal offence. True, as pointed out above, this is an area where states deliberately want to retain a broad margin of discretion. Nevertheless, a few points are clear.

The basic point is that the customary rules and the treaty provisions (Art. 2(4) read in conjunction with Art. 51 of the UN Charter) that prohibit aggression as an international wrongful act are *different from and broader than* the customary rules that criminalize aggression. The two legal regimes of responsibility for aggression are different not only because each notion is linked to a different 'primary' or substantive international rule of customary law, but also with regard to the preconditions of responsibility and in respect of the legal consequences of such responsibility.

First of all, aggression as an international wrongful act is any serious and large-scale breach of Article 2(4) not justified by Article 51 (and the corresponding customary rules). As such, aggression is subject to the legal regime governing the so-called aggravated responsibility of states.[9]

As for criminal law, international practice, particularly as evinced by the views set forth by states within the United Nations (in particular on the occasion of the adoption of the 1970 Declaration on Friendly Relations[10] and of the 1974 Definition), seems to bear out the proposition that customary rules have evolved to the effect that only the *most serious and large-scale instances* of use of force (not legitimized by the UN Charter as collective enforcement or collective or individual self-defence) may be regarded as amounting to international crimes involving the criminal liability of those who planned, organized, and masterminded aggression. For example, it would seem difficult to deny that the attack by Iraq on Kuwait in 1990 was not only a breach of Article 2(4) of the UN Charter, not justified by self-defence, but also an international crime of aggression.

In contrast, the following are not international crimes, although they may constitute breaches of the ban on the use of military force (albeit not necessarily aggression) – that is, international wrongful acts giving rise to *state* responsibility: (i) breaching Article 2(4) of the UN Charter by violating through the use of force the territory or the air space or the independence of a state by means of acts that are sporadic or in any event not large-scale; (ii) engaging in an armed conflict in violation of international treaties proscribing resort to armed violence; (iii) using force under the authority of the resolution of an international body or on humanitarian grounds but in contravention of the UN Charter; or (iv) resort to self-defence in disregard of the conditions laid down in Article 51 of the UN Charter (for instance,

9. On the notion of 'aggravated state responsibility' I take the liberty of referring to my *International Law* (2005), 262–77.

10. UNGA Res. 2625 (XXV). Principle I (2) states that 'A war of aggression constitutes a crime against peace, for which there is responsibility under international law'.

individual self-defence not followed by a report to the Security Council or collective self-defence initiated without a request by the victim state and not followed by such state's consent). All these acts would be illegal state conduct not amounting to aggression as a crime proper.

Second, international rules on aggression as a wrongful act of a state only envisage and ban aggression *by a state against another state*. This is because traditionally international rules tend to govern interstate dealings. They normally address themselves to states (plus intergovernmental organizations); only exceptionally do they impose obligations on and grant rights to individuals (this is the case with rules on human rights). The UN Charter and the 1974 resolution on the Definition of Aggression, as well as the law of state responsibility, follow this pattern. In contrast, international criminal rules by definition address themselves to individuals. There is therefore no logical or legal obstacle to rules on aggression also criminalizing aggressive acts *by non-state entities* (such as terrorist armed groups, organized insurgents, liberation movements, and the like) against a state. Since this body of law is geared to penalizing individuals' misconduct, one cannot see what would stand in the way of extending criminal liability for aggression to individuals who do not belong to and do not act on behalf of a state. If the purpose of the relevant international rules is to protect the world community from serious breaches of the peace, one fails to see why individuals operating for non-state entities should be immune from criminal liability for aggressive conduct.

Third, an additional *subjective* element is required by international criminal rules for aggression that is instead not envisaged for aggression as an international state delinquency (see below).

Fourth, the UN Security Council has primary and exclusive jurisdiction over aggression *by states* as a breach of the ban on the use of force and, within the framework of aggravated responsibility, is authorized to take all the measures envisaged in the Charter to prevent or stop aggression. In contrast, that UN body has no primary and exclusive responsibility in the field of international criminal liability of *individuals* (be they state officials or agents of a non-state entity) for aggression. It follows that a decision of the Security Council condemning actions by a state as aggression may have no direct impact on courts empowered to adjudicate crimes of aggression. Courts are free to make any finding in this matter regardless of what is decided by the Security Council in the area of state misconduct and consequent responsibility.

It is thus clear that one of the merits of the distinction between two different regimes of responsibility lies in, among other things, enabling courts that try persons accused of aggression legitimately to embrace a judicial approach which may differ from the political stand taken by international political bodies such as the UN Security Council. There may be cases where one of those bodies does not consider that aggression has materialized, whilst a national or international court may take a contrary position and consequently find individuals criminally responsible for aggression. The contrary is also true. In sum, national or international courts should not be bound by any decision taken by a political body, whereas political bodies should duly take into consideration any judicial finding on the matter. It remains true, however, that when the Security Council concludes that in a particular instance

acts committed by a state amount to aggression, it may sometimes prove easier for a national or international court to find that aggression as a crime was perpetrated and therefore to pronounce on the issue of whether the individuals involved are criminally liable. For courts, pronouncements of the Security Council constitute important elements that may count along with relevant evidence for their making judicial findings on criminal liability for aggression.

3. Objective and subjective elements of the crime

3.1. Objective elements

Generally speaking, customary international law essentially prohibits some traditional forms of aggression as either international wrongful acts or criminal acts, or both. These instances of aggression, constituting the core of the notion normally valid for *both categories* of responsibility, are basically those envisaged in terms of the 1974 Definition,[11] and confirmed, at least in part, by the ICJ in *Nicaragua*[12] (although admittedly solely with respect to state responsibility).

Customary international law appears to consider the following as an international *crime*: the planning, or organizing, or preparing, or participating in, the first use of armed force by a state or a non-state organization or other organized entity against the territorial integrity and political independence of another state in contravention of the UN Charter, provided the acts of aggression concerned are large-scale and produce serious consequences. It follows that single attacks that, albeit very serious in nature, are limited in scope and time (such as for example that of Israel on Iraq in 1981) may constitute blatant breaches of the ban on the use of force and consequently give rise to the aggravated responsibility of the attacking state; nevertheless, they do not amount to crimes. Instead, a massive attack such as that of 11 September 2001 against the United States, while it is not a breach of the aforementioned ban (which only concerns states), amounts to an international crime (more precisely, to both

11. The objective element of aggression as an international crime may comprise various instances, if they exhibit the necessary character of massiveness. Mention can be made of some instances, substantially based on the 1974 Definition: 1. The invasion of or the attack on the territory of a state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory or part of the territory of a state. 2. Bombardment, or use of any weapon or lethal device, by the armed forces of a state or a non-state entity, against the territory of another state (as long as such bombardment or use of weapons is not isolated or sporadic). 3. Blockade of the ports or coasts of a state by the armed forces of another state or a non-state entity. 4. Large-scale attack on the land, sea, or air forces, or marine and air fleets of a state. 5. The massive use of the armed forces of a state or a non-state entity, which are within the territory of another state with the agreement of the receiving state, in blatant contravention of the conditions provided for in the agreement and the customary rules on the use of force. 6. The sending by or on behalf of a state or a non-state entity of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against a state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

12. In addressing the element of aggression defined in Article 3(g) of the Definition, whereby aggression includes the case where a state 'sends or is substantially involved in sending into another state armed bands with the task of engaging in armed acts against the latter state of such gravity that they would normally be seen as aggression', the Court held that 'This description . . . may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces' (para. 195).

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a crime against humanity and a crime of aggression) thus involving the criminal liability of its authors.

It is clear from the intrinsic features of aggression that such crime (i) is never perpetrated by single individuals acting severally – instead, it always results from some sort of *collective action of a plurality of persons*; (ii) is an offence attributable to *political and military leaders and other senior state officials (or leading organs of a non-state entity)* – that is, those who mastermind, plan, or organize the crime. Instead, it may not involve the personal criminal liability of low-level perpetrators (for instance, it would seem difficult to charge with aggression the pilots carrying out air raids in foreign territory in execution of an aggressive plan, unless of course those pilots were fully aware of the illegality and criminal nature of the acts). It follows that normally the mode of responsibility for aggression is participation in a joint criminal enterprise to plan or wage aggression.

3.2. Subjective elements

The crime also requires *criminal intent*. It must be shown that the perpetrator intended to participate in planning and waging aggression; was aware of the scope, significance, and consequences of the action taken; and substantially contributed to 'shaping' or 'influencing' the planning or waging of aggression. A leader or high-ranking military officer or senior state official or leading private individual (for instance, an industrialist) may also bear responsibility if he has *knowledge* of other leaders' plans and willingly pursues the criminal purpose of furthering the aggressive aims. International case law on this matter is clear and consistent.[13]

As is convincingly argued by a commentator,[14] aggression requires in addition a *special intent*, that is, the will to achieve territorial gains, or to obtain economic advantages, or deliberately to interfere with the internal affairs of the victim state (for instance, by toppling its government or bringing about a change in its political regime or ideological leanings or in its international political alignment). It would seem that the standard by which to evaluate whether an individual harbours that special intent can be found in the General Treaty of Paris for the Renunciation of War (or Kellogg-Briand Pact) of 27 August 1928, which banned war as 'an instrument of national policy'. In short, any unlawful attack against a state intentionally carried out as an instrument of national policy (hence, to acquire territory; or coerce the victim state to change its government or its political regime, or else its domestic or foreign policy; or to appropriate assets belonging to the victim state) amounts to aggression as a criminal act.

13. See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, I, 279–80 (Göring), 282–4 (Hess), 285–6 (von Ribbentropp), 288–9 (Keitel), 291 (Kaltenbrunner), 294–5 (Rosenberg), 296 (Frank), 299–300 (Frick), 302 (Streicher), 304–5 (Funk), 307–10 (Schacht), 310–11 (Dönitz), 315–16 (Raeder), 317–18 (von Schirach), 320 (Sauckel), 322–4 (Jodl), 325–7 (von Papen), 328–30 (Seyss-Inquart), 330–1 (Speer), 333–6 (von Neurath), 336–7 (Fritzsche), 338–9 (Bormann). See also *Araki and others* (Tokyo trial), in B. V. A. Röling and C.-F. Rüter (eds.), *The Tokyo Judgment* (1977), I, at 456, as well as the *Röchling* case (T., at 4,7,10; ST, at 406–8).

14. S. Glaser, 'Quelques remarques sur la définition de l'agression en droit international pénal', in *Festschrift für Th. Rittler* (1957), 388; S. Glaser, 'Culpabilité en droit international pénal', (1960-I) 99 RCADI 504. Glaser's views are taken up by G. Werle, *Principles of International Criminal Law* (2005), at 395.

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This of course bears out that, as in the case of genocide, the notion of aggression is split into two separate concepts, one valid for wrongful acts of states (where no special intent would be required, for the purpose of banning armed attacks in breach of Article 2(4) of the UN Charter as much as possible), the other for individuals' criminal offences (where instead the requisite subjective element of crime includes special intent).

4. Whether conspiracy to wage aggression is criminalized

The Statutes of both the Nuremberg International Military Tribunals (IMT) and the Tokyo Tribunal provided that, in addition to aggression (planning, preparation, initiation, or waging of a war of aggression), participation in a conspiracy to wage such a war was also criminalized. The indictments in both cases charged aggression as well as, as a separate charge, conspiracy to wage aggression.

The Nuremberg IMT merged conspiracy with planning a war of aggression (at 225–6). It acquitted some defendants (e.g. Funk and Speer) of conspiracy (because they had not participated in the early stages of the planning of aggression) and in the event found no defendant guilty solely of conspiracy.

The Tokyo Tribunal tended instead to envisage the two charges as separate, and indeed found one defendant (Foreign Minister Shigemitsu) guilty of waging a war of aggression but acquitted him of conspiracy, whereas it held another defendant (ambassador Shiratori) guilty of conspiracy but acquitted him of aggressive war.

In spite of the different attitude taken by the two Tribunals and the lack of any follow-up in subsequent case law, it would seem that conspiracy to wage a war of aggression may be regarded as a separate crime in ICL. Aggression is such a devastating crime, with serious knock-on consequences for peace and the whole international community, that it seems warranted to infer from the present system of ICL the criminalization of the early stages of preparation of the crime, when more persons get together and agree to put in place the necessary measures to engage in a war of aggression. It is also notable that there is a parallel prohibition in the field of *state* responsibility: that, laid down in Article 2(4) of the UN Charter, relating to the mere threat of force. If such threat has been proscribed in interstate dealings so as to quench any attempt or preliminary steps towards the actual use of force, it is only natural for ICL also to criminalize the 'preliminaries' to the crime of aggression – that is, the getting together of leaders and their agreeing to engage in aggression.

However, this inchoate crime (that is, a preliminary offence that has not been completed and has not yet caused any harm) is only criminalized per se if it is *not* followed up by the actual undertaking of aggression. If this happens, aggression as a crime 'absorbs' the crime of conspiracy.